Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. A 1271

74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Associate Counsel

JONATHAN K. GOLDEN, ESQ.
8383 Wilshire Boulevard, No. 510
Beverly Hills, California 90211
(213) 655-5011

BURTON MARKS, ESQ.
a member of
LAW OFFICES OF BURTON MARKS
A PROFESSIONAL CORPORATION
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
(213) 655-5011

Attorney for Petitioner

DEAN-STANDEFER, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

	Page
Petitioner prays for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Subsidiary Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement of the Case	6
Reasons for Granting A Hearing	7
The case presents a new and novel issue	7
The principal question presented	9
Subsidiary Questions Presented	18
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases	Page
Adams v. Maryland, 374 U.S. 179 (1954)	17
Albertson v. SACB, 382 U.S. 70 (1965)	9
Berger v. California, 393 U.S. 314 (1969)	21
Bruton v. United States, 391 U.S. 123 (1968)	22
Bubis v. United States, 384 F.2d 643 (9th Cir. 1967)	19
California v. Byers, 402 U.S. 424 (1971)	9, 10, 11, 12, 14
California v. Green, 399 U.S. 149 (1970)	21, 22
Carnley v. Cochran, 369 U.S. 506 (1962)	11
Daniels v. Tearney, 102 U.S. 415	21
DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969)	19, 20
Dombroski v. Pfister, 380 U.S. 479 (1965)	20
Glasser v. United States, 315 U.S. 60 (1942)	8
Griswold v. Connecticut, 381 U.S. 479 (1965)	20
Grosso v. United States, 390 U.S. 62 (1968)	9
Hanley v. United States, 416 F.2d 1160 (5th Cir. 1969)	21
Hanna v. United States, 393 F.2d 700 (5th Cir. 1968)	19
Haynes v. United States, 390 U.S. 85 (1968)	9
Hoffman, 341 U.S. 479 (1951)	14

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Johnson v. Zerbst, 304 U.S. 458 (1938)	11
Kastigar v. United States, 406 U.S. 441 (1972)	11, 15, 16
Katz v. United States, 389 U.S. 347 (1967)	19, 20
Lefkowitz v. Turley, ... U.S. ....., 94 S. Ct. 316 (1973)	11, 12, 13, 14
Lookretis v. United States, 398 F.2d 64 (7th Cir. 1968), vac. & rem. 390 U.S. 338 (1968)	13
Mackey v. United States, 401 U.S. 667 (1971)	9, 11, 12, 14
Marchetti v. United States, 309 U.S. 38 (1968).	9, 11, 13, 14
McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965)	21
Miranda v. Arizona, 384 U.S. 436 (1966)	15
Murphy v. Waterfront Commission, 378 U.S. 52 (1964)	13
NAACP v. Button, 371 U.S. 415 (1962)	20
Nardone v. United States, 302 U.S. 379 (1937), 308 U.S. 338 (1939)	19
Osborne v. United States, 371 F.2d 913 (9th Cir. 1967)	19
Pointer v. Texas, 380 U.S. 400	21
Rea v. United States, 350 U.S. 214 (1956)	21, 22

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Sabatino v. Curtis National Bank of Miami Springs, 415 F.2d 632 (5th Cir. 1969), cert. denied 396 U.S. 1052	21
State v. Tims, 90 F.2d 136 (1967)	20
Sugden v. United States, 226 F.2d 281 (9th Cir. 1955)	19
United States v. Calandra, ... U.S. ....., 94 S. Ct. 613 (1974)	11, 16
United States v. Covello, 410 F.2d 536 (2nd Cir. 1968)	19
United States v. Freed, 401 U.S. 601 (1971)	16, 17
United States v. Knox, 396 U.S. 77 (1969)	9, 10, 11, 14
United States v. Richard M. Nixon, 42 U. S. L. W. 5237 (1974)	18
United States v. Sullivan, 274 U.S. 259 (1927)	7, 8, 9, 10, 11

United States Constitution

First Amendment	3, 19
Fourth Amendment	3, 16, 19
Fifth Amendment	2, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17
Sixth Amendment	4, 5, 20, 21
Ninth Amendment	3, 19

Federal Rules of Criminal Procedure

Rule 17	3, 19

TABLE OF AUTHORITIES CITED

United States Statutes	Page
18 U.S.C. § 1084	5, 8
18 U.S.C. § 1732(a)	4, 20, 21
18 U.S.C. § 1952	5, 8
26 U.S.C. § 7203	6, 10, 11
26 U.S.C. § 7206	10
28 U.S.C. § 1254(1)	2
47 U.S.C. § 605	3, 19

IN THE SUPREME COURT OF THE UNITED STATES

NO. A 1271

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ROY D. GARNER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of conviction of violations of various federal gambling statutes entered in the United States District Court for the Central District of California.

OPINION BELOW

The opinion of the Court of Appeals, sitting en banc, has

not yet been officially reported and is printed in the appendix hereto as Appendix A (..... F.2d .....).

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1974 (Appendix A). A timely Petition for Rehearing was denied on June 11, 1974 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

An Order Extending Time To File Petition For Writ Of Certiorari, signed by Mr. Justice Douglas and dated July 10, 1974, extended the time to file this petition to and including August 9, 1974 (Appendix C—Order and letter forwarding same).

QUESTIONS PRESENTED

1. **Whether a defendant, in a criminal prosecution unrelated to the Federal Income Tax Laws, may invoke the protection of the Fifth Amendment privilege not to be "compelled in any criminal case to be a witness against himself . . . " to exclude incriminating answers to questions on his income tax returns.**

2. **Whether the disclosure requirement in the Federal Income Tax Laws, backed by statutory penalties for non-compliance, is governmental compulsion of the type proscribed by the Fifth Amendment.**

3. **Whether, by answering questions posed in an income tax return, a citizen voluntarily relinquishes his privilege against self-incrimination as well as his right to exclude that evidence in any subsequent judicial or quasi-judicial proceeding.**

4. **Are not the competing interests of government in gathering data for a valid and socially neutral purpose, when balanced against the rights of the individual to remain silent, not to incriminate one's self and to privacy, each served best by the simple expedient of compelling answers in the first instance, through a system of self-reporting, and by then protecting the individual from the government's use of the answers in subsequent criminal proceedings?**

SUBSIDIARY QUESTIONS PRESENTED

A number of issues raised on appeal to the Ninth Circuit were rejected out of hand by the reviewing court (Appendix D). The instant Petition for Writ of Certiorari includes some of those subsidiary issues, and it is requested that this Court not only grant the writ in order to review the essential questions which concern the Court of Appeals but, also, to consider the following subsidiary questions presented:

1. Whether the seizure of telephone toll records of petitioner and their subsequent admission into evidence violated rights guaranteed petitioner under Title 47 U.S.C. § 605, under Rule 17 of the Federal Rules of Criminal Procedure, and under the First, Fourth and Ninth Amendments to the United States Constitution.

2. Whether the introduction of testimony by F.B.I. agents concerning conversations with co-defendants Swank and Long, used for impeachment purposes, was improper as impeachment on a collateral matter and improperly argued to the jury by the United States Attorney as substantive evidence.

3. Whether the United States Attorney committed prejudicial misconduct by twice asking questions of character witnesses concerning alleged fabricated and unfounded accusations of cheating on the part of petitioner.

4. Whether various items of evidence admitted under the authority of Title 18 U.S.C. § 1732(a)–the "business records" exception to the hearsay rule–should have been excluded because some of the material did not conform to the requirement of that section; and whether § 1732(a), as applied, is unconstitutional and violative of petitioner's Sixth Amendment right to confrontation of witnesses.

5. Whether, under the circumstances, the government should have been estopped to call co-defendant Jack Swank as a witness against petitioner.

6. Whether, as a matter of due process of law, the evidence was sufficient to convict petitioner of conspiracy as charged in Count 1 of the Indictment.

7. Whether the District Court committed error by refusing to give personalized requested instructions, thus denying petitioner due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . . "

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . "

18 U.S.C. § 1084:

> **"Transmission of wagering information; penalties**
>
> "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission . . . of bets or wagers . . . shall be fined not more than $10,000 or imprisoned not more than two years, or both."

18 U.S.C. § 1952:

> **"Interstate and foreign travel or transportation in aid of racketeering enterprises**
>
> "(a) Whoever travels in interstate or foreign commerce or uses any faciiity in interstate or foreign commerce, including the mail, with intent to–
>
> " . . .
>
> "(3) otherwise promote,manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, . . .
>
> "(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, ... "

STATEMENT OF THE CASE

This case raises the fundamental question as to whether a citizen who answers questions on his income tax return under statutory compulsion may later exclude those answers in a non-tax-related criminal proceeding by invoking his Fifth Amendment privilege against self-incrimination, or whether he has relinquished the privilege by failing to assert it on his tax return.

The facts material to the question are not in dispute:

Petitioner was convicted by a jury of conspiring to violate federal gambling statutes. To prove that he was engaged in the "business of betting and wagering"–an essential element of the conspiracy as charged–the government offered into evidence petitioner's federal income tax returns for the years 1965 through 1967, on which petitioner had reported gambling as the source of most of his income. The returns were admitted over petitioner's objection.

A divided panel of the Court of Appeals for the Ninth Circuit filed an opinion reversing the judgment of conviction on June 5, 1972. The opinion was subsequently vacated upon the granting of the government's Petition for Rehearing. The only issue discussed therein was the admissibility of the income tax returns, and petitioner's remaining contentions on appeal were rejected out of hand (Appendix p. 52). The majority opinion concluded that the disclosures on a tax return are compelled under Title 26 U.S.C. § 7203; that in view of the statutory compulsion, furnishing answers on the return would not be construed as an implied waiver of the Fifth Amendment by the taxpayer, and therefore, the privilege could properly be invoked to exclude the answers at a subsequent

non-tax-related criminal trial.

The government's Petition for Rehearing and suggestion for rehearing en banc was granted on April 11, 1974. The Court of Appeals filed an opinion affirming the conviction (Appendix pp. 1 - 9), five judges dissenting (Appendix pp. 10 - 49). Citing *United States v. Sullivan*, 274 U.S. 259 (1927), the majority held that notwithstanding the statutory compulsion to provide the government with information on the return, petitioner could have asserted his privilege not to incriminate himself therein, and his failure to do so renders the privilege unavailable to him at the criminal trial.

Upon the granting of the government's Petition for Rehearing, petitioner made application for "equal rights and opportunities," requesting that the court consider en banc the contentions summarily rejected by the first panel. The application was denied.

REASONS FOR GRANTING A HEARING

This case presents a new and novel issue, presented for the first time to this Court, dealing with the questions as to when the right against compulsory self-incrimination must be asserted, and whether failure to assert the right prior to criminal proceedings permits the introduction of those statements into evidence over Fifth Amendment objections.

Specifically at issue here is whether the trial court properly overruled petitioner's timely objection, on Fifth Amendment grounds[1], to the introduction of his income tax returns for the years 1965, 1966 and 1967 at his criminal trial in 1970,

---

[1]Other objections such as "hearsay" (and failure to first establish a corpus delicti) were voiced at the same time and overruled.

which returns contained the statement that the source of his income was from professional gambling.[2]

Essentially, a resolution of that question depends upon whether the language hereafter quoted from *United States v. Sullivan, supra,* 274 U.S. at 263-264 (wherein the Court ruled that the Fifth Amendment right against self-incrimination did not constitute a defense to a prosecution for failure to *file* an income tax return), is applicable today to serve as a bar to petitioner's assertion of the privilege against self-incrimination at his criminal trial:

> "If the form of return provided calls for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if a defendant desired to test that or any other point, he should have tested it in the return, so that it could be passed upon."

---

[2]The question as to whether, as here, an element of the corpus delicti of the offense is a violation of 18 U.S.C. § 1084 (i.e., "being engaged in the business of betting or wagering . . . " and the similar elements in 18 U.S.C. § 1952) can be proven by the extrajudicial statement of the defendant is not discussed, but see Glasser v. United States, 315 U.S. 60 (1942)

The Principal Question Presented[3]

Does the foregoing language from *Sullivan* constitute dicta or law; and if it was an accurate statement of law in 1927, is it still viable, or has it been overruled *sub silentio* by *Marchetti v. United States,* 309 U.S. 38 (1968); *United States v. Knox,* 396 U.S. 77 (1969), and *Mackey v. United States,* 401 U.S. 667 (1971), all of which stand for the proposition that truthful disclosures made under statutory compulsion on gambler's tax returns must be excluded in subsequent criminal proceedings upon the defendant's assertion of his Fifth Amendment right against self-incrimination.

The majority below reads *Sullivan* as establishing the taxpayer's right to invoke the privilege on his tax return.[4] It finds support for this principle in *California v. Byers,* 402 U.S. 424 (1971), wherein this Court upheld the constitutionality of California Vehicle Code § 2002, requiring persons involved in traffic accidents to stop and identify themselves. *Marchetti* and its companion cases–*Grosso v. United States,* 390 U.S. 62 (1968), and *Haynes v. United States,* 390 U.S. 85 (1968)–were distinguished on the grounds that those cases involved questions intended to illicit incriminating responses and were directed at individuals "inherently suspect of criminal activities" in "an area permeated with criminal statutes." See *Albertson v. SACB,* 382 U.S. 70, 79 (1965)

---

[3]Other subsidiary questions raised in the Appellant's Opening Brief but never reached by the appellate judges as a division or en banc (see footnote 4, majority opinion–Appendix p. 2) are raised *infra,* at the conclusion of the presentation of this principal question.

[4]A majority of the Court of Appeals speaks of the privilege as being "unavailable" and does not use the word "waiver," although the concept of "implied waiver" is plainly at work in the majority opinion.

Conversely, in *Sullivan* and *Byers*, the questions asked were designed to assist the government in accomplishing a socially neutral purpose, in gathering information used in its regulatory functions, rather than with an eye towards prosecution of a select group of individuals. Therefore, the majority concluded that the compulsion to answer is not violative of the Fifth Amendment, and petitioner, once having answered on the return, is deprived of standing to assert the privilege at a later date, when it becomes apparent that the answers are incriminating.

The majority reaches this result even though at the time the statements were made petitioner had no reason to know or believe:

(a) that the statements were, or would become incriminatory at some time in the future;

(b) that notwithstanding the statutory command on the return that truthful and complete answers be given, the privilege could have been asserted; and

(c) that the answers would be admissible against him in a non-tax-related criminal trial.

The tax returns offered against petitioner were filed in 1965, 1966 and 1967. The information contained therein did not take on an incriminating character until after he wad indicted in January of 1970.

Added to petitioner's ignorance of the use to which his answers might be put in the future, was his certain knowledge, at the time of filing, that he could be prosecuted for making false statements on the return (26 U.S.C. § 7206; see *United States v. Knox, supra*) and the exhortation printed on the form to answer each question completely (26 U.S.C. § 7203).

In the face of such compulsion, the majority, without saying so, presumes a waiver[5] of the privilege, notwithstanding the admonition of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), that–

> "Courts indulge every reasonable presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights."

The minority of the Court of Appeals were of the opinion that *Sullivan* and *Byers* were inapposite, since *Marchetti* plainly held that the privilege is available to exclude incriminating answers on tax returns at trial, even though the defendant had failed to invoke his privilege on the tax return.[6] Moreover, the dissent opined that the statutory compulsion (26 U.S.C. § 7203) to give truthful and complete answers on the return renders those statements compelled within the meaning of the Fifth Amendment and, accordingly, inadmissible in evidence in a prosecution against the declarant. *United States v. Knox, supra; Mackey v.*

---

[5] The practical problems in asserting the privilege on a tax return are discussed in the dissenting opinion (Appendix pp. 45 and 46). Assuming that this is a question which still has viability, as suggested by the minority, petitioner believes that it is an academic question at best, because (a) the likelihood of a taxpayer being prosecuted for taking the Fifth Amendment on a tax return is extremely remote, and (b) as suggested, *infra*, a logical extrapolation from California v. Byers, 402 U.S. 424 (1971), Kastigar v. United States, 406 U.S. 441 (1972); U. S. v. Calandra, ... U.S. ..... (1974), and Lefkowitz v. Turley, ... U.S. ..... (1973), would indicate that the privilege against self-incrimination can only be asserted in a judicial or quasi-judicial proceeding where the incriminatory nature of the evidence first becomes obvious.

[6] The original panel opinion agreed with this contention. That opinion, as observed by the majority in its subsequent en banc ruling, has provoked considerable academic comment. See, *e.g.*, 86 Harv. L. Rev. 914 (1973); 17 How. L. J. 919 (1973); 26 Vand. L. Rev. 350 (1973); 34 U. Pitt. L. Rev. 510 (1973); 30 Wash. and Lee L. Rev. 182 (1973); 7 U. Rich. L. Rev. 371 (1972); 14 Wm. & Mary L. Rev. 203 (1972); 24 Hastings L. J. 959 (1973) (Appendix p. 2, n. 4).

United States, supra.

Be it in a statutory inquiry or a criminal prosecution, a witness protected by the constitutional privilege against compelled self-incrimination may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers, and evidence derived therefrom in any subsequent criminal case in which he is a defendant; absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him at a later criminal prosecution. *Lefkowitz v. Turley*, ... U. S. ....., 94 S. Ct. 316 (1973).

Petitioner believes that the Court is now faced with a new and novel question, the resolution of which necessarily requires the balancing of the competing interests of the government in compelling information from its citizens as a necessary adjunct to raising revenue, counter-balanced by the individual's Fifth Amendment right not to be compelled in a criminal case to become a witness against himself.[7]

> "Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protection on the other; neither interest can be treated lightly." *California v. Byers, supra* at page 427.

---

[7]Space does not permit an exhaustive philosophical discussion of the kind undertaken by the dissent (Appendix pp. 10-49) in attempting to analyze what kind of balance must be struck between the government's need for data and the individual's privilege against self-incrimination and right to privacy. At this point, petitioner desires simply to acknowledge the complex ramifications of the central issue posed by this petition.

This Court has repeatedly held that a witness's failure to remain silent does not terminate his right to exclude self-incriminating answers on the grounds that they were involuntarily given. See *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Lefkowitz v. Turley, supra. Marchetti* established that a defendant who failed to invoke his privilege on the return could subsequently exclude incriminating answers at trial. The Court's readiness to exclude such compelled evidence stems, of course, from the initial violation of the Fifth Amendment by the inquiring authorities–in this case, the Internal Revenue Service. That the IRS does compel answers under threat of prosecution has long been recognized, and more recently in *United States v. Knox, supra,* the Court observed that the Fifth Amendment is offended when a defendant has yielded to statutory compulsion and furnished incriminating information.

> "The Court of Appeals [in *Lookretis v. United States,* 398 F.2d 64 (7th Cir. 1968); *vac. & rem.* 390 U.S. 338 (1968)] ruled that truthful disclosures made under the compulsion of § 4412, could not be introduced against their maker in a criminal proceeding. However, the Fifth Amendment was offended in *Lookretis* precisely because the defendant had succumbed to the statutory compulsion by furnishing the requested incriminatory information." *Id.* at page 82.

United States v. Sullivan, supra, held that the privilege against self-incrimination was no defense to the charge of failure to file an income tax return. It did not hold that the Fifth Amendment privilege was unavailable as a bar to a prosecution for refusal or failure to answer a particular question on

a tax return. Nor did it hold that assertion of the privilege was a bar to such a prosecution. This latter fact was recognized by the Court in *Byers, supra,* 402 U.S. at 434, n. 6. Indeed, the dictum of *Byers* casts doubt upon the Court of Appeals' fundamental assumption that the taxpayer may avail himself of the privilege on his return.

> "A name, linked with a motor vehicle, is no more incriminating than a tax return, linked with the disclosure of income, in *United States v. Sullivan, supra.* It identifies, but does not by itself, implicate anyone in criminal conduct." *Byers, supra* at 433-434.

The approach taken by the majority seems to be at odds with the implicit holding of *Byers* which suggests that when questions neutral on their face are addressed to the public at large, for a valid neutral social purpose, and which require self-reporting, the citizen has no privilege to refuse to answer.[8]

Petitioner contends that the inferences obtained from *Sullivan* and *Byers* by the majority regarding the necessity of asserting the privilege at the first opportunity are logically untenable. A snythesis of the principles announced in *Marchetti, Knox, Mackey* and *Lefkowitz* compels the conclusion that the right to assert the privilege occurs only when the controversy actually arises and it is apparent that the interests of the government and the citizen have become adverse. Petitioner submits that the privilege is available

---

[8] In the case at bar, it could be argued that at the time the returns were filed, there was no "real and substantial" possibility that they would provide incriminating evidence. Hoffman v. United States, 341 U.S. 479 (1951). Hence, a claim of privilege by petitioner would have been unsustainable.

only (1) when it is apparent from the total context of the situation that the person has become suspect and should assert the privilege, because answers may be self-incriminating (e.g., interrogation by a police officer, grand jury, or other governmental agency), or (2) when statements previously given are offered against him in a judicial or quasi-judicial proceeding.

In the latter instance, if the statement was compelled, it is, of course, incumbent upon the government to establish as a foundational fact that the individual made a knowing and intelligent waiver of his right prior to making the statement. See, e.g., *Miranda v. Arizona,* 384 U.S. 436 (1966).

Petitioner's declaration that the principal source of his income came from ganbling was not an incriminating statement at the time it was made, but neither was it a voluntary statement; hence, the only forum open to petitioner for testing the viability of the privilege was the District Court, which, in light of recent decisions by this Court, may well be the only proper forum in which to exercise one's Fifth Amendment privilege, other than the custodial interrogation situation.

It is settled that compelled self-incrimination is not *per se* violative of the Fifth Amendment, but that in exchange for incriminating answers, the witness must be guaranteed immunity from their use at a later criminal prosecution. *Kastigar v. United States,* 406 U.S. 441 (1972). The Fifth Amendment has not been violated because the individual can look to the court to exclude his compelled testimony.

Similarly, although a grand jury may predicate an indictment upon illegally obtained evidence, in a subsequent

criminal proceeding against the victim of the illegal search and seizure, the court will exclude that evidence in order to effectuate the Fourth Amendment right of all citizens to "be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . . . " *United States v. Calandra*, ... U.S. ....., 94 S. Ct. 613 (1974). Once again, it is the court that gives meaning and effect to the constitutional right; the court is the only forum wherein the right can be asserted. The Court, in *Calandra*, reasoned that the grand jury's public responsibility to carry out criminal investigations should not be hampered or limited by allowing the subpoenaed witnesses to challenge, on Fourth Amendment grounds, the admissibility of evidence sought to be introduced. The clear implication of *Calandra* and *Kastigar* is that the government's interest in compelling testimony and exposing the truth is paramount, but that the citizen whose rights are violated may look to the court to exclude evidence, be it testimonial or documentary, seized in violation of the Fourth or Fifth Amendments.

The same kind of balancing between the government's legitimate need for information, and the citizen's right to prevent compelled evidence from being introduced against him in a judicial setting was recognized in *United States v. Freed*, 401 U.S. 601 (1971), where this Court validated a portion of the National Firearms Act, requiring citizens to report the transfer of firearms and furnish the government with a photograph and fingerprints of the transferee. In exchange for requiring such disclosure, the Act prohibited the use of such information against the registrant or applicant as evidence in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of

the application or registration.

The majority opinion below suggests that in light of its ruling, Congress might feel that enactment of a statute providing use immunity for information contained in tax returns is in order. However, "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Adams v. Maryland*, 374 U.S. 179, 181 (1954).

The government may well be justified in obtaining information from its citizens under statutory compulsion. However, it may not, consistent with the Fifth Amendment, be justified in using such evidence in subsequent criminal proceedings without first demonstrating a knowing and intelligent waiver against the right of self-incrimination by the declarant.

The government's entire scheme for the collection of income taxes rests upon the taxpayer's duty to report truthfully and completely the source and amount of his income. The majority position hinders the collection of taxes by the IRS by encouraging the taxpayer to provide as little information as possible on the return, lest it somehow be used against him in the future.

By forcing the taxpayer to claim the privilege on his return or not at all, the Court of Appeals has forced the individual to identify himself as a criminal suspect, and has left unanswered numerous questions concerning the application of the privilege to various inquiries on the return. Additionally, by applying the privilege to the governmental demand for regulation, it necessarily has left itself with a choice between serving the regulatory interest or the Fifth

Amendment. Such a choice is not necessary, for if one, instead, focuses on the *use* of compelled disclosures, which, as the minority opinion points out, is at the point where "there is no longer a socially neutral purpose being served, and the threat of the breakdown of the accusatorial system and a whipsawing of a defendant is a reality," an accommodation of interests is possible by granting the individual use immunity.

The granting of use immunity, furthermore, is consistent with the Court's view that privileges are to be narrowly construed.

> "The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. * * * Whatever their origins, the exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."
>
> *United States v. Richard M. Nixon,*
> 42 U. S. L. W. 5237, 5245 (1974).

Subsidiary Questions Presented

Petitioner believes that the following questions, synthesized from the Appellant's Opening Brief, are ones which are meritorious and go to the validity of the petitioner's conviction, but were never passed upon by the Court of Appeals for the Ninth Circuit:

1. The seizure of telephone toll records of the petitioner and their subsequent admission into evidence violated petitioner's rights under 47 U.S.C. § 605, under Rule 17 of the Federal Rules of Criminal Procedure, Title 18 U.S.C., and under the First, Fourth and Ninth Amendments to the Constitution of the United States. This seizure of petitioner's telephone toll records under the purported authority of Rule 17, Title 18, U.S.C., and Section 605, imposes a prior restraint on the exercise of First Amendment rights, acts as a chilling effect on free speech, and infringes petitioner's rights under the Ninth Amendment to the United States Constitution.

The following is a list of cases which are applicable. The Circuit Court cases indicate a conflict as to whether this type of evidence is admissible.

[violation of 47 U.S.C. § 605]

Nardone v. United States, 302 U.S. 379 (1937), 308 U.S. 338 (1939);

Hanna v. United States, 393 F.2d 700 (5th Cir. 1968);

Sugden v. United States, 226 F.2d 281 (9th Cir. 1955);

Bubis v. United States, 384 F.2d 643 (9th Cir. 1967);

United States v. Covello, 410 F.2d 536 (2nd Cir. 1968);

Osborne v. United States, 371 F.2d 913 (9th Cir. 1967);

Katz v. United States, 389 U.S. 347 (1967);

DiPiazza v. United States, 415 F.2d 99

(6th Cir. 1969);

[killing effect on free speech]

Katz v. United States, supra;

Dombroski v. Pfister, 380 U.S. 479 (1965);

NAACP v. Button, 371 U.S. 415 (1962);

[privacy]

Griswold v. Connecticut, 381 U.S. 479 (1965).

2. Various items of evidence admitted under the authority of 18 U.S.C. § 1732(a) should not have been admitted in that some of the material did not conform to the requirements of that section, and that section (§ 1732(a)) is unconstitutional as violative of petitioner's Sixth Amendment right to confrontation of witnesses.

The government was permitted to introduce various selections from the Daily Racing Form (RT 264) over the objections as to hearsay and violation of confrontation of witnesses.

The Daily Racing Form was used to prove the fact that the horse race was run. Evidence established that the form is compiled by a private agency for its own business purposes; the employees of the California Horse Racing Board do not compile, edit, correct or authenticate the records (RT 256-264).

Under these circumstances, it is submitted that the Federal Business Records Act violates, at least in this instance, the Sixth Amendment right to confrontation of witnesses, since it was used to prove an essential element of the offense. See *State v. Tims,* 90 F.2d 136 (1967).

Additionally, the Daily Racing Form is a mere "cumu-

lation of hearsay" and not admissible. *Sabatino v. Curtis National Bank of Miami Springs,* 415 F.2d 632 (5th Cir. 1969), *cert. denied* 396 U.S. 1052.

Other cases dealing with the question as to whether the Business Records Act violates the Sixth Amendment are: *Hanley v. United States,* 416 F.2d 1160 (5th Cir. 1969), and *McDaniel v. United States,* 343 F.2d 785 (5th Cir. 1965).

Also in point are: *Pointer v. Texas,* 380 U.S. 400, and *California v. Green,* 399 U.S. 149 (1970).

See also *Berger v. California,* 393 U.S. 314 (1969).

3. The government should have been estopped to call Jack Swank as a witness against petitioner Garner.

The government opposed a motion for severance on the part of petitioner at the start of the previous trial. As a result, Jack Swank, who exercised his Fifth Amendment right, did not take the stand. This, in effect, denied petitioner (1) the ability to call Jack Swank in his defense, and (2) the ability to cross-examine Jack Swank, who remained, to the jury, a person whose activities–according to the government theory–inculpated petitioner.

It is fundamental that the prosecution cannot act in such a way as to deprive a defendant of a defense, without running afoul of due process. From the testimony given by Swank at the instant trial, it is clear that it completely exculpates petitioner. Thus, petitioner was denied a defense by the government, and the government should not, therefore, be allowed to benefit by that wrongful action. See *Daniels v. Tearney,* 102 U.S. 415; *Rea v. United States,*

350 U.S. 214 (1956).

Second, petitioner Garner was deprived of his right to confront Swank, who was, in reality, a witness against him. The government thus forced petitioner to relinquish his right to confrontation in the previous trial and should not be allowed to benefit from that act in this trial by calling Swank and then arguing to the jury, as it did, that Swank was a liar. See *Bruton v. United States,* 391 U.S. 123 (1968); *California v. Green, supra.* The trial court determined that the previous trial was a nullity. Obviously, however, if the previous trial warranted a judgment of acquittal, rather than a new trial, due process would require acquittal. Similarly, in this case, if the ability to have Swank as a defense witness could have had a substantial impact on the previous jury, and thus could have resulted in acquittal, the government should not now be allowed to attempt to use that witness against Garner. Having deprived petitioner of evidence capable of rendering acquittal, the government should not now benefit from that act of deprivation.

CONCLUSION

For the foregoing reasons, the writ should issue.

Respectfully submitted,

BURTON MARKS

JONATHAN K. GOLDEN
Associate Counsel

Attorney for Petitioner

INDEX TO APPENDIX

		Page
"A"	Opinion of the Ninth Circuit Court of Appeals filed April 11, 1974	1
	Dissenting Opinion	10
"B"	Order Denying Petition for Rehearing ..	50
"C"	Order Extending Time to File Petition for Writ of Certiorari and letter forwarding same	51
"D"	Excerpt from the first opinion of the Ninth Circuit Court of Appeals (June 5, 1972)	52.

APPENDIX A

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

No. 71-1219.

ROY D. GARNER, Appellant, vs. UNITED STATES OF AMERICA, Appellee.

[FILED APRIL 11, 1974]

Appeal From the United States District Court
For the Central District of California

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN and WALLACE, Circuit Judges*

WALLACE, Circuit Judge:

A jury found Garner guilty of conspiring[1] to violate various federal gambling statutes.[2] He appeals the conviction based upon that verdict, alleging error of constitutional proportions. We affirm.

The gist of the government's evidence was that co-

---

*Honorable Joseph T. Sneed was inducted subsequent to the submission of this case and, therefore, did not participate in the decision.

[1] *See* 18 U.S.C. § 371.

[2] *See* 18 U.S.C. § 224 (bribery in sporting contests); 18 U.S.C. § 1084 (interstate transmission of bets or wagers by one in the business of betting or wagering); and 18 U.S.C. § 1952 (use of an interstate facility to distribute proceeds of unlawful activity).

conspirators Lawler and Swank were making elaborate bets on selected horses on the basis of information supplied by Garner. Near the conclusion of the case, the government introduced into evidence, over objection, Garner's federal income tax returns (Forms 1040) for the years 1965, 1966 and 1967. Those returns indicated that Garner derived almost all of his income from gambling or wagering.[3] Although the prosecutor did not question any witnesses concerning the returns, he did refer to them during his closing argument to the jury.

Garner argues that the introduction of his tax returns into evidence in this non-tax prosecution violates his privilege against self-incrimination.[4] He claims that the decision in *Marchetti v. United States,* 390 U.S. 39 (1968), eroded the vitality of this circuit's rule that income tax returns may be used as evidence in a non-tax prosecution. *See Stillman v. United States,* 177 F.2d 607, 617-18 (9th Cir. 1949).[5]

At issue is the nature of the privilege against self-incrimination guaranteed by the Fifth Amendment.[6] The

---

[3]Although he listed income from those sources, he took none of the offsetting deductions allowed by law. *See, e.g.,* Int. Rev. Code of 1954, § 165(d).

[4]The original panel opinion in this case (June 5, 1972), agreed with this contention, dismissing his other claims as without merit or lacking sufficient substance. That opinion already has provoked considerable academic comment. *See, e.g.,* 86 Harv. L. Rev. 914 (1973); 17 How. L. J. 919 (1973), 26 Vand. L. Rev. 350 (1973); 34 U. Pitt. L. Rev. 510 (1973); 30 Wash. & Lee L. Rev. 182 (1973); 7 U. Rich. L. Rev. 371 (1972); 14 Wm. & Mary L. Rev. 203 (1972); 24 Hastings L. J. 959 (1973).

[5]Although *Stillman* relied in part on the public records language of Int. Rev. Code of 1939, § 55, and on Shapiro v. United States, 335 U.S. 1 (1948), we choose neither as a basis for this decision.

[6]The Fifth Amendment of the United States Constitution provides in part "nor shall [any person] be compelled in any criminal case to be a witness against himself . . . . "

language of the amendment would permit a construction which limited its availability to a defendant's oral testimony in a criminal proceeding.[7] However, in 1892, the Supreme Court rejected so narrow an interpretation.[8] The privilege is now available to a potential criminal defendant well before proceedings actually begin[9] as well as to a witness in criminal[10], civil[11], grand jury[12], or legislative[13] proceedings. However, the scope of a defendant's privilege is greater than that he would enjoy if he were only a witness. Not only may a defendant refuse to answer questions but he is also entitled not to be called as a witness at his trial. The witness, on the other hand, has no right to be immune from inquiries though he may decline to respond to them by claiming his privilege. This differing treatment results from the nature of the privilege. *See* C. McCormick, Evidence §§ 130, 136 (2d ed. 1972).

Garner stated in his tax returns that he derived

---

[7]"I am convinced that the Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding." Grosso v. United States, 390 U.S. 62, 76 (1968) (Stewart, J., concurring).

[8]Counselman v. Hitchcock, 142 U.S. 547 (1892). The case's holding was rather narrow, but the opinion contained broad language indicating availability in any criminal matter. *Id.* at 562. Thirty years later, the Court held that the privilege applied "alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

[9]*See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966).

[10]Counselman v. Hitchcock, *supra* note 8.

[11]McCarthy v. Arndstein, *supra* note 8.

[12]United States v. Monia, 317 U.S. 424, 427 (1943), relying upon Counselman v. Hitchcock, *supra* note 8.

[13]Quinn v. United States, 349 U.S. 155 (1955).

income from gambling and wagering. At that time, he was not a defendant but a witness. The privilege, therefore, must be asserted at some time. The simple question is whether he should have claimed his privilege at the time he filed his return or whether he could wait until his subsequent conspiracy trial.[14]

Our inquiry necessarily must begin with *United States v. Sullivan,* 274 U.S. 259 (1927).[15] Sullivan was a bootlegger who did not file income tax returns. He was convicted for this failure and appealed. A unanimous Court upheld the conviction, holding that a tax return was required. Justice Holmes wrote:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point, he should have tested it in the return so that it could be passed upon.

[14]We believe the Fifth Amendment privilege is at issue in this case. This may not be a universal conclusion. Justice Harlan would not have extended the privilege to a regulatory scheme such as that involved in California v. Byers, 402 U.S. 424 (1971). He contended that the privilege was not founded on absolute values and that conflicting interests must be balanced to determine whether the privilege exists. *Id.* at 449-50, 454, 458 (Harlan, J., concurring). *See also* Meltzer, *Privileges against Self-Incrimination and the Hit-and-Run Opinions,* in 1971 Sup. Ct. Rev. 16-25.

[15]An earlier case, Johnson v. United States, 228 U.S. 457 (1913), might also serve as a starting point. Johnson transferred his books to the trustee in bankruptcy under the compulsion of law. Bankruptcy Act § 70, ch. 541, 30 Stat. 544 (1898) (codified at 11 U.S.C. § 110). These books were introduced against him in a criminal prosecution for concealing money from the trustee. The Court held that Johnson was not privileged from their production.

Id. at 263-64. *Sullivan* clearly establishes that all citizens must file tax returns despite obvious hazards of self-incrimination. By stating that "if the defendant desired to test that or any other point, he should have tested it on the return . . . ," the Court intimates that full disclosure of the amounts and sources of income must be made unless the taxpayer makes an objection in his return, asserting his privilege not to incriminate himself.

Garner provided the source of his income on his return and failed to invoke his privilege. Can he, at the late date of his trial, assert it? Assume Garner had witnessed an automobile accident in the parking lot of Pomona Fairgrounds on September 25, 1968. If he had been subpoenaed as a witness in a civil trial concerning the accident and had testified that he was there and saw everything, those admissions could have been used in his conspiracy trial to prove that he was at the race track on the day when the first race was allegedly fixed. His privilege would be unavailable because he had failed to assert it during the civil trial. At the civil trial, he was subpoenaed to testify by the power of the court; and he could have been awed by the direction of the judge to answer the questions. But, if he failed to assert his privilege and proceeded to testify, his answers could be used against him. His failure to invoke his privilege in his tax returns produces a similar result.

Recent Fifth Amendment cases have indicated that compelled disclosures in response to governmental inquiries may violate the privilege against self-incrimination. *See Leary v. United States,* 395 U.S. 6 (1969); *Haynes v. United States,* 390 U.S. 85 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Marchetti v. United States,* 390 U.S. 39 (1968); *Albertson v. SACB,* 382 U.S. 70 (1965). However, the compulsion in those cases was intended to elicit incriminating responses and was directed at individuals "inherently suspect of criminal activities" in "an area permeated with criminal statutes . . . ."[16]

This case, *Sullivan,* and *California v. Byers,* 402 U.S. 424 (1971), are different. The questions in *Sullivan* and here were neutral on their face and directed to the public at large in an effort to implement the federal tax power. In fact, many cases have distinguished *Sullivan* for exactly those reasons.[17] *Byers* involved a non-criminal state statute "directed at all persons . . . who drive automobiles in California." 402 U.S. at 430. The Court noted that self-reporting was "indispensable to its fulfillment." *Id.* at 431. In other words, the questions asked in each of these cases were designed to assist the government in its accomplishment of a legitimate goal. They were not designed to produce incriminating answers and thus should be treated differently.

---

[16] Albertson, *supra,* 382 U.S. at 79.

[17] *See* Grosso, *supra,* 390 U.S. at 67; Marchetti, *supra,* 390 U.S. at 48-49, 50-51; Albertson, *supra,* 382 U.S. at 78-79. *See also* Byers, *supra,* 402 U.S. at 433-34 (plurality), 471-72 (Brennan, J., dissenting); Grosso, *supra,* 390 U.S. at 72 (Brennan, J., concurring). It comes too easy to say that because Sullivan was decided forty-five years ago it is no longer an effective precedent. This overlooks the fact that, by continuously distinguishing and referring to Sullivan, the Court has maintained its vitality.

Although the dissent vigorously contends that Garner was compelled to incriminate himself and that his answers were not voluntary, the question of "voluntariness" relates more to the *Miranda* situation than it does to Garner's case. Here, it only tends to divert from the critical issue. There is a vast difference between an in-custody interrogation and filling out a tax return in the quiet of one's home. We have no doubt that every taxpayer is under a form of "compulsion" to complete and file his return not dissimilar to the compulsion involved in other activities in which the government also has a legitimate regulatory interest. This form of compulsion, however, is not the kind of involuntariness that was condemned in *Miranda.* The questions asked on the tax return were completely neutral; only Garner knew a response might be incriminating. As to all taxpayers in general, there was only "compulsion" to provide the government with the information it was entitled to demand. As to Garner specifically, there was "compulsion" *to incriminate.* But because Garner knew his answers might be incriminating, he had a choice either of claiming his privilege or declining to do so and answering the questions. Had Garner chosen to claim his privilege on the tax return, the government would ultimately have had to decide whether it was willing to grant him immunity in order to obtain the answer.[18] But the granting of immunity must be in the hands of the government, not in the hands of taxpayers who provide

---

[18] Since the privilege is applicable only if the specific response would come within the scope of protection and the witness is not the ultimate arbiter of whether this is the situation, a decision on the propriety of invoking it cannot be made unless the question has been put and the witness has asserted his basis for refusal to answer. C. McCormick, Evidence § 136, at 289 (2d ed. 1972) (footnote omitted).

incriminating answers rather than assert their privilege.[19]

Accepting appellant's contention would provide us with an unpalatable result. We have held that a taxpayer must assert his privilege against self-incrimination in his return in response to a specific question. Just as he had no right to be immune from questioning, likewise he is not free to immunize himself from prosecution by volunteering information to the government. To hold otherwise would allow any witness in any proceeding the later protection of the Fifth Amendment to frustrate the use of information derived from earlier testimony when the witness failed to invoke his privilege. If this were the law, immunity from use of incriminating information might well be achieved without government approval by merely including it in a tax return. Such a decision would "embark us on uncharted and treacherous seas." *Byers, supra,* 402 U.S. at 458 (Harlan, J., concurring).[20]

An equally disquieting result of an acceptance of appellant's contention would be the difficulty in defining the outer perimeters. If a privilege can be asserted at a later

---

19 Sullivan upheld a conviction for failure to file an income tax return on the theory that "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U.S., at 263. That declaration was based on the view, *first,* that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and *second,* that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim. Albertson v. SACB, 382 U.S. 70, 79 (1965).

20 If Congress feels that this decision might jeopardize revenue collection, it might provide use immunity for information contained in tax returns. However, we do not feel that a judicial decision is the appropriate method for altering the complex and interrelated tax systems of this country. *See* Byers, *supra,* 402 U.S. at 442-43 (Harlan, J., concurring); Marchetti, *supra,* 390 U.S. at 59-60; 86 Harv. L. Rev. 914, 919 n. 25 (1973).

date for information contained in a tax return, could not every subpoenaed witness in court make the same claim? Would not every response to an inquiry, originating at any level of government from census taker to property tax questioner, repose a right in the respondent to later shield those answers? This "would be an extreme if not an extravagant application of the Fifth Amendment . . . . " *Sullivan, supra,* at 263-64.

We have stated that Garner failed to assert his privilege. Others might construe this as an implied waiver of its protection. That characterization overlooks the fact that the Fifth Amendment does not automatically cloak our every utterance in the fabric of its rubric. We must invoke and assert its benefits. "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." *Couch v. United States,* 409 U.S. 322, 328 (1973). Essentially, the question is whether in this situation the Fifth Amendment is a right which can be invoked retrospectively or whether it is a privilege which must be claimed when the incriminating information is requested. Here, we hold it to be a privilege which Garner should have asserted in his tax return. Having failed to do so, he may not claim its benefit during his trial.

AFFIRMED.

Judges Chambers, Merrill, Duniway, Wright, Trask and Choy concur in this opinion.

[Throughout this dissenting opinion reference is made to the majority opinion, often referring specifically to the lines of the slip opinion as well as the page. For the convenience of the Court, where these references are specifically made to lines, we will quote the material referred to.]

KOELSCH, Circuit Judge, with whom Judges BROWNING, ELY, HUFSTEDLER and GOODWIN join, dissenting:

The question presented is whether Garner, in this criminal prosecution unrelated to the federal income tax laws, may invoke the protection of the Fifth Amendment privilege not to "be compelled in any criminal case to be a witness against himself . . . " to exclude incriminating answers to questions on his tax return. The answer requires the resolution of two issues. The first, whether the disclosure requirement in the tax law, backed by statutory penalties for non-compliance, is governmental compulsion of the type proscribed by the Fifth Amendment; the second, whether by answering, Garner voluntarily relinquished his privilege. Both require careful factual analysis and scrutiny of the purposes served by Supreme Court decisions. The majority opinion avoids the analysis by purporting to reach neither issue, although, in my opinion, the conclusory rationale offered conceals an unexplained decision on one of the two, and perhaps both, grounds.

The majority agrees that the privilege applies in the context of regulatory inquiries (n. 14), but, expressly rejecting reliance on the argument that Garner might have waived his privilege by answering [Appendix p. 9–"We have stated that Garner failed to assert his privilege. Others might construe

this as an implied waiver of its protection. That characterization overlooks the fact that the Fifth Amendment does not automatically cloak our every utterance in the fabric of its rubric."], holds that the nature of the privilege precludes consideration of Garner's constitutional claim when asserted at his criminal trial rather than on the return. The majority states:

> Essentially, the question is whether the Fifth Amendment is a right which can be invoked retrospectively or whether it is a privilege which must be claimed when the incriminating information is requested. Here, we hold it to be a privilege which Garner should have asserted in his tax return. [Appendix p. 9.]

The holding proceeds from the premise that the Fifth Amendment provision creates a testimonial privilege which in its historical development has come to be applied to one in Garner's position [Appendix pp. 2-3]. The majority reasons that a privilege operates to justify a refusal to answer questions when they are first asked–not as an exclusionary mechanism to exclude answers once they have been given–and therefore Garner's objection at trial is not properly the invocation of a privilege. The majority concludes that since the Fifth Amendment creates a privilege and not a "retrospective" right, any protection the Amendment provides is unavailable to exclude the answers compelled from Garner when introduced at trial. To the extent that the majority relies solely on this basis, its decision is completely untenable, both in theory and under the Supreme Court decisions which bind the determination in this case.

The majority draws important consequences from the

technical distinction between a right and a privilege, rather than analyzing the Fifth Amendment dangers in light of the particular circumstances under which Garner answered. However, even accepting the assumption that the protection of the Fifth Amendment is limited to that afforded by a technical privilege, the majoirty is still wrong in the assertion that the nature of a testimonial privilege precludes Garner's objection to the introduction of the tax return. Many testimonial privileges operate not only to excuse the person holding the privilege from answering, but also to allow him to exclude the testimony of others. For instance, the client may invoke the lawyer-client privilege to prevent the lawyer from testifying about the client's communications, even those involving admissions of a crime. The privilege is available to exclude reliable testimony in order to advance the public policies surrounding the relationship in which the communication was made. By analogy, the policy against governmental compulsion is served by the exclusion of answers obtained in violation of the policy, and Garner's ability to command their exclusion is the exercise of a privilege in the same sense that the client's ability to exclude the lawyer's recital of his prior admission is a privilege. If the majority rests its decision on the ground that the concept of a "privilege" is too narrow to encompass Garner's objection, an analysis of common law privileges alone suggests that the majority is in error.

More fundamentally, the fact that the constitutional provision has been historically regarded as a "privilege" does not mean, as the majority assumes, that the clause does not create a constitutional right cognizable at Garner's

trial. In a strict Hohfeldian sense[1] the freedom from testimonial compulsion created by the Amendment is a right against the court. If Garner has a privilege on his tax return, he may answer or not; and the government has no right to compel the answer. If he answers, the government is privileged to introduce his answer if he has no right which the court will recognize to prevent it. The court, however, exercises the judicial power to decide Garner's case on the basis of the Constitution's delegation of sovereignty, one of the express conditions on which is the Fifth Amendment. The court is under a constitutional duty not to allow Garner to be compelled to be a witness against himself because the Constitution commands forebearance for the benefit of those in his position; against the court's duty he has a correlative right, not privilege. The scope of his right depends on the extent of the court's duty to exclude the evidence, ordinarily entailing an analysis of the policy of the constitutional provision in light of the particular facts involved. The point is not that Garner is entitled to reversal because he has a constitutional right, but rather that the majority opinion neatly, but inaccurately, sidesteps the constitutional analysis required to decide the case.

The majority's position has been repeatedly rejected, both explicitly and implicitly, by the Supreme Court. For instance, in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), Justice Goldberg states:

> The constitutional privilege against self-incrimination has two primary interrelated

---

[1] *See generally*, Corbin *Legal Analysis and Terminology*, 29 Yale L. J. 163, 167-8 (1919).

> facets: The Government may not use compulsion to elicit self-incriminating statements, see, *e.g., Counselman v. Hitchcock,* 142 U.S. 547; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. See, *e.g., Haynes v. Washington,* 373 U.S. 503. . . . Now that both governments are fully bound by the privilege, the conceptual difficulty of pinpointing the alleged violation of the privilege on "compulsion" or "use" need no longer concern us. (378 U.S. at 57 n. 6)

In *Lefkowitz v. Turley,* ..... U.S.L.W. ..... (U.S. November 19, 1973), Justice White, writing for a unanimous Court,states:

> [A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar v. United States,* 406 U.S. 441 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram v. United States, supra; Boyd v. United States, supra.*

The coerced confession cases, from *Bram v. United States,* 168 U.S. 532 (1897), through *Miranda* and its progeny, consistently indicate that the failure of the defendant to remain silent does not end the analysis, and that the protection against self-incrimination afforded by the constitutional

privilege extends to the exclusion of prior answers when they are involuntarily given. Cf. *Jackson v. Denno,* 378 U.S. 368 (1964). The majority's reliance on the assertion that Garner's privilege cannot be "retrospectively" invoked because he failed to "invoke and assert the benefits of his privilege" [Appendix p. 9] when first asked the incriminating question is misplaced—the coerced confession cases do not require a ritualistic explicit invocation of the privilege, or a request to remain silent or see a lawyer, before a subsequent self-incriminating answer may be excluded at trial. Rather, the cases make clear that the privilege is applicable at trial if the prior answer was coerced. Instead of addressing the relevant inquiry of whether Garner's answers were in fact coerced, the majority ostensibly avoids the issue by restricting the Fifth Amendment to the first of Justice Goldberg's facets. Under the majority's reasoning, incriminating answers extracted by governmental coercion do not fall within the Fifth Amendment if the defendant fails to invoke and assert his privilege when first asked. Clearly that is not the law.

The privilege does more than provide a defense to one who sticks to his guns and is prosecuted for his silence rather than succumbing to the governmental compulsion. In a situation analogous to the present case, the Court, in decisions relating to the wagering tax law[2] found unconstitutional in *Marchetti v. United States,* 390 U.S. 39 (1968), has indicated the privilege is available to exclude incriminating answers on tax returns at trial even though the defendant had failed to invoke his privilege on the return. For instance,

---

[2] 26 U.S.C. § 4411-12.

in *Lookretis v. United States,* where the defendant had given incriminating answers on the wagering tax return found violative of the privilege in *Marchetti* and his answers had been used against him in a subsequent prosecution (*see* 398 F.2d 64 (7th Cir. 1968)), the Court, apparently considering the use of the returns an equivalent violation of his privilege, vacated his conviction and remanded. *Lookretis v. United States,* 390 U.S. 338 (1968). In *United States v. Knox,* 396 U.S. 77 (1969), the Court, in upholding a conviction for filing a false return which under *Marchetti* did not have to be filed, distinguished *Lookretis:*

> The Court of Appeals ruled that truthful disclosures made under the compulsion of § 4412 could not be introduced against their maker in a criminal proceeding. However, the Fifth Amendment was offended in *Lookretis* precisely because the defendant had succumbed to the statutory compulsion by furnishing the requested incriminatory information. 396 U.S. at 82.

Adhering to that view, *Mackey v. United States,* 401 U.S. 667 (1971), again indicated that the Court views the use of compelled answers as the equivalent of the compulsion of answers for purposes of Fifth Amendment analysis. The Court in *Mackey* held that its decision in *Marchetti* did not have retroactive application, but Mackey, unlike Marchetti, had filed an incriminating return without asserting a privilege. The Seventh Circuit thought Mackey's objection might have been waived, but the Supreme Court plurality opinion, in a comment on which eight of the nine Justices agreed,[3] stated:

[3]Justices Douglas and Black thought Mackey entitled to relief, assuming a

> The statutory requirement to register and file gambling tax returns was held to compel self-incrimination and the privilege became a complete defense to a criminal prosecution for failure to register and pay the related taxes. It followed that the registration and excise tax returns filed in response to the statutory command were compelled statements within the meaning of the Fifth Amendment and accordingly were inadmissible evidence as part of the prosecution's case in chief. 401 U.S. at 672.

In contrast to the circuit court, the Supreme Court indicated that the privilege is sufficient to exclude answers at a subsequent trial if the privilege was a "defense to a criminal prosecution for failure to register," (401 U.S. at 672), without analysis of whether answering waived the privilege.

The majority's approach is irreconcilable with *Mackey,* particularly if one reads *United States v. Sullivan,* 274 U.S. 259 (1927), as the majority purports to, for the proposition that *Sullivan* recognized the privilege as a defense to a prosecution for filing an incomplete return if claimed with respect to particular questions on the return. If *Garner* was, as the majority asserts, privileged not to answer particular questions on the return, it is only because in respect to those questions the self-reporting scheme of the tax return, backed by statutory compulsion to answer, unconstitutionally compelled

3 (cont'd) constitutional violation. 401 U.S. at 713. Justices Brennan and Marshall did not think Marchetti was controlling, but indicated Mackey would have been entitled to use immunity if his answers had been introduced in a prosecution unrelated to the statute under which disclosure was compelled, as in our case. 401 U.S. at 710-11. On his theory of retroactivity, Justice Harlan did not reach the issue. 401 U.S. at 700.

him to incriminate himself. It follows that the privilege became a complete defense for failure to answer those particular questions, and under *Mackey*,—"It followed . . ." that answers to questions he was privileged not to answer "filed in response to the statutory command were compelled statements within the meaning of the Fifth Amendment and accordingly were inadmissible evidence as part of the prosecution's case in chief." 401 U.S. at 672. As the majority correctly points out [Appendix p. 6], the differences in the statutory schemes make *Marchetti* and *Mackey* inapposite in determining whether there is unconstitutional compulsion in Garner's case. However, once the majority acknowledges the existence of a privilege on the return, depending only on whether the information requested is incriminating, the distinction becomes irrelevant, unless the majority is making the unexplained, and probably inexplicable, argument that different consequences should flow from supposed qualitative differences in acknowledged constitutional violations.

The root of the majority's dilemma is that it has mistaken a privilege for the opportunity to assert one. Garner is privileged to ignore the statutorily imposed duty to answer questions only if the court will not impose the sanctions provided by the tax laws for incomplete returns. The court will refrain from doing so only to the extent dictated by statute, or prior decision interpreting the constitutional command—in those cases the court must recognize the privilege as completely excusing the breach of the normal duty to answer. The privilege is not the possible availability of a constitutional defense if prosecuted, but rather the actual recognition that he is free not to answer.

In fact, what Garner had, when filling out his tax return, was at most the knowledge that the constitutional provision might lead a court to validate the privilege as a defense, and not a privilege.

No court has ever recognized the Fifth Amendment as the source of a valid defense for failure to answer a question on a tax return. *Sullivan* does not. It holds only that the privilege does not excuse a failure to file a tax return. Since many of the questions were innocuous, Sullivan's remedy of refusing to answer all of them was overbroad. It was considered an extreme and extravagant application of the privilege to allow it to defeat the social purpose in obtaining a tax return from Sullivan. The oft-repeated dicta, on which the majority relies for the proposition that Garner must assert the privilege on the return, told Sullivan that the privilege might have provided a defense for refusal to answer particular questions and that the Court might have decided the merit of his claim of privilege in respect to them. The Court has never, as it recently recognized,[4] held that the privilege excuses a failure to answer particular questions on the return.

Either way one reads *Sullivan*, the majority's holding is wrong. It is either inconsistent with *Mackey*, or the majority is telling Garner that the court will not decide his claim of privilege in a criminal case, the only point in time at which the constitutional provision applies on its face, because he did not run the risk of an uncertain invocation of the privilege on his tax return.

The majority criticizes the position Garner, and the

---

[4]California v. Byers, 402 U.S. 424, 434 n. 6 (1971).

original panel opinion, take for making the Fifth Amendment into a "right which can be invoked retrospectively." [Appendix p. 9] The comment reveals a verbal sleight-of-hand which inverts the entire history and development of the privilege. The majority's failure to understand the significance of either the method of or reasons for the extension of the privilege to "witnesses," which it recites [Appendix p. 3], is particularly unfortunate because an understanding of the rationale of the historical development of the privilege is necessary in deciding both issues presented by this case—the proper manner of application of the privilege in the context of regulatory inquiries, and the "voluntariness" of Garner's answers on the tax return. Analysis of the historical development indicates that completely different issues, requiring reconciliation of different values, are involved in adjudicating a claim of privilege, depending on the nature of the governmental compulsion and the timing and forum in which the claim is raised. If what is "at issue is the nature of the privilege against self-incrimination . . . " [Appendix p. 2], then the majority opinion is neither in accord with the policies, or development and nature, of the privilege.

The historical development and extension of the privilege reflects what the privilege is—precisely, the recognition by a court that the law, to effectuate ulterior values and policies, in the circumstances imposes no duty to answer. The privilege is a defense to a prosecution for refusing to answer because the refusal does not breach the witness's ordinary duty to answer. The development of the privilege, or its extension to novel situations, begins initially as a recognition, in the context of a criminal prosecution, that

the defendant should not be punished for failure to answer because the law does not impose the duty. Thereafter, once recognized as a defense to a prosecution, the privilege will be recognized by the court to excuse a witness from answering so long as the questions are ones which he is under no duty to answer.

As many commentators have pointed out, the courts which have radically expanded the scope of the constitutional privilege have never agreed on the values to be promoted by eliminating the duty to answer in those cases.[5] Among the values most frequently advanced are the preservation of an accusatorial rather than inquisatorial method of criminal prosecution, the prevention of governmental immorality, akin to the first, and the preservation of privacy and individual dignity. In part, the confusion over purposes reflects their interrelationship. Concern for the accusatorial system is a concern for the preservation of individual privacy as well, reflecting the Lockean notion that government is essentially a restraint on liberty and ought to leave the individual alone. Wigmore, no lover of the privilege, thought it necessary to prevent degeneration into unjust modes of criminal prosecution:

> The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination developes to rely mainly upon such evidence, and to be satisfied with an

---

[5] California v. Byers, *supra*, at 448-51 (Harlan, J., concurring). Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968); McKay, *Self-Incrimination and the New Privacy*, 1967 S. Ct. Rev. 193, 193-98 (1967).

> incomplete investigation of other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. Wigmore, Evidence § 2251 (McNaughten rev. 1961).

The concern for an "accusatorial" system reflects the necessity that the integrity of the judicial process remain high in the eyes of those subject to it, in order to preserve its effective operation. The privilege is essential to the preservation of an adversary, accusatorial system of criminal procedure because it is the cornerstone of the rest of the procedural safeguards afforded the criminal defendant —all are hollow if the defendant can be compelled to condemn himself in anticipation of trial.

The development of the privilege has historically been through recognition in novel situations that the law should impose no duty on the defendant to answer. The origin of the constitutional provision lies in the dilemma of men like More or Lilburne, who were imprisoned for refusal to subscribe to the oaths required of them. Knowing that if they took the oath and answered honestly they would have to admit holding views considered criminal under applicable statutes, they refused and were imprisoned. The constitutional privilege "against being compelled in any criminal case to be a witness against" one's self thus originally evolved from the recognition of a defense to a prosecution or punishment for refusing the oath, or refusing to answer under oath.[6] By the time of the adoption of the

[6] *See* Miranda v. Arizona, 384 U.S. 436, 459 (1966); Friendly, *supra*, at 677-79. *See generally*, Levy, *Origins of the Fifth Amendment, The Right Against Self-Incrimination* (1968).

Fifth Amendment, the privilege had some application to pre-trial stages of criminal proceedings, and there was a common law rule excluding coerced confessions.[7]

The Fifth Amendment does not term itself a "privilege," but at the time of its adoption it was so conceived. On its face, the only thing clear about the applicability of the proscription of testimonial compulsion is that the answers sought must ultimately be capable of use in a criminal case; until the late 19th century, the privilege applied only to the criminal proceeding for which the incriminating answers were sought. Justice Stewart's comment that the "Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding. . . ."[8] is accurate, with the qualification that originally and until the late 19th century, the "judicial proceeding" was the criminal trial in which the witness was defendant.

The original concept of a privilege thus limited to the defendant's criminal trial has been abandoned. The Court has interpreted the constitutional provision to create a valid defense to a prosecution for refusal to answer questions in a variety of judicial and quasi-judicial proceedings, and, under some circumstances, for a refusal to file answers to regulatory inquiries. The landmark expansion occurred in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), where the Court held that the constitutional provision afforded a defense to a contempt conviction

[7] Friendly, *supra*, at 678.

[8] Grosso v. United States, 390 U.S. 62, 76 (1968).

predicated on a witness's refusal to answer questions before a grand jury. In *McCarthy v. Arndstein,* 266 U.S. 341 (1924), the Court held that the privilege provided a valid defense for refusal to testify in a civil, bankruptcy proceeding. Taken together, the two cases allow a witness to refuse to answer in any quasi-judicial proceeding, civil or criminal, if his answers would be incriminating in a subsequent criminal trial.

In each instance in which the Court has expanded the scope and applicability of the privilege, it has done so to prevent circumvention of its purposes by coercion prior to criminal proceedings, thereby making the protection afforded in the criminal trial context effective. As expressed in *Counselman:*

> It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. 142 U.S. at 562.

The Court's fear is that if the witness were not protected in his refusal to answer prior to the criminal trial, the government could effectively short-circuit the trial privilege by compelling answers in anticipation of a trial and there-

after introducing them. By compelling answers, the government could abandon independent investigation in favor of forcing the individual to identify himself as a criminal suspect, providing the first "link in the chain" of prosecution. By validating a witness's resfusal to answer outside the criminal trial context, the Court removes the incentive for employing compulsion against him, effectively relegating prosecuting officials to independent investigation, and thereby securing the privilege's purpose.

The Court's logic in extending the privilege beyond the trial context is not unassailable, because it assumes, perhaps unwarrantedly, that the answers compelled would be admissible at a later trial. In fact, there are almost always two ways for a court to remove the incentive for prosecutorial circumvention of a defendant's trial privilege. The first is to recognize a privilege prior to a criminal trial to refuse to answer. The second is to require the witness to answer initially, and, upon invocation of his privilege, to exclude his compelled answers when sought to be introduced in his subsequent criminal trial, placing the burden on the government to prove beyond a reasonable doubt that the evidence it has compelled has not provided a link in the chain of evidence presented in court. The second approach closely resembles the Court's approach to coerced confession cases, which is instructive because as in our case the initial disclosure is not sought in a judicial or administrative proceeding where the rules of evidence or privilege have an immediate impact.

Analysis of the reasons for the development of the privilege and of the alternative approaches available to a court reveals the extent of the majority's misconception

of the nature of the constitutional privilege. The "use immunity" which Garner requests is simply the second approach—a decision that faced with the constitutional imperative, the trial court must exclude compelled testimony in a criminal trial. This approach is closer to the original view of the Amendment's protection as a privilege restricted to the criminal trial than the majority's position. The fact that the history of the Fifth Amendment has seen the expansion of the privilege to situations where it may be claimed in anticipation of danger of use in a criminal prosecution in no way relieves the court of the responsibility of deciding whether it is applicable when claimed during the course of that trial. Even accepting the majority's assumption that *Sullivan* recognized the privilege as a defense to a prosecution for failure to answer particular questions on a tax return, there is no logical basis for assuming that the Court thereby meant to eliminate the trial privilege. Precisely the opposite would be the logical conclusion—allowing the privilege to operate both before and at trial best serves the Court's purpose in extending the privilege of preventing the circumvention of an "accusatorial system."

More importantly, the alternative approaches available to the court provide a reasonable solution to the problem of reconciling the government's need for information with the purpose of the privilege presented by "neutral," information-gathering, regulatory inquiries, enforced by statutory compulsion. The majority, as noted earlier, indicates that it considers the privilege applicable in the context of regulatory inquiries (n. 14)—in this respect we are in complete agreement. Ordinarily, coercion of incriminating answers gives rise to a claim of privilege—the result should not be

altered by the fact that the coercion is created by a neutral regulatory statute. No matter how overwhelmingly non-criminal and apparently innocuous the purpose of the inquiry, self-disclosure systems contain a too obvious and substantial potential for use in criminal proseuction to ignore the Fifth Amendment dangers created. From the point of view of the individual, as witnessed by Garner's situation, even the most innocuous questions may call for incriminating answers. Were these excluded from the scope of the privilege, the opportunity would arise for comprehensive schemes of self-reporting in non-criminal areas to become data banks containing numerous "admissions" of criminal activity, available without limitation to prosecuting authorities. The use of computers potentially capable of analyzing data and reporting criminal violations makes both real, and substantial, the danger that the unfettered exercise of governmental power may degenerate into a pattern of extracting confessions on forms for use in later prosecutions. The application of the privilege fulfills the traditional purpose of removing the incentive to fall into oppressive modes of prosecutorial conduct; to do otherwise would " . . . ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation'." *Marchetti, supra,* 390 U.S. at 51.

Because of the alternative approaches available in applying the privilege, the fact that the privilege should apply in the regulatory context does not necessarily indicate when it should apply. I do not share the majority's certainty, in reliance on the *Sullivan* dictum, that the privilege is applicable when a self-incriminating question is first asked. Because Garner asserted his privilege at trial rather than as a defense for refusing to answer, it is not necessary to decide

when the privilege first becomes applicable in his case; in either event he is entitled to exclude the answers at trial if they were involuntary. Nevertheless, the rationale selected is of considerable consequence, both in reconciling the government's need for information with a potential defendant's need for protection, and because substantially different decisions are called for, depending on when the privilege applies.

I think it proper to sustain the privilege in the courtroom to exclude compelled answers in situations where the privilege might not be a defense to a prosecution for failure to answer those same questions in a questionnaire. Particularly in the regulatory context, a different complex of values is involved in deciding the applicability of the privilege in each instance. Substantial non-prosecutorial social purposes are served by compelled disclosure. Analyzed in light of the attenuated possibility of prosecutorial use of the answers, the government's interest might reasonably preclude a court from recognizing a privilege to refuse to answer the inquiries. When the answer is introduced at trial, however, the non-criminal purpose justifying compelled responses has been served and a different decision is involved, weighing a different complex of values and reanalyzing the threat of governmental misconduct.

There may be no violation of the Fifth Amendment in initially compelling answers because even if incriminating, they are not required in a "criminal case"; the violation of the "privilege" arises only when the government seeks to introduce compelled evidence in a criminal trial. The fact that compelled self-incrimination is not per se a

constitutional violation[9] indicates that the Fifth Amendment language is primarily a constitutional directive to the courts on the admissibility of certain types of testimony and evidence in a criminal trial. The purpose is to prevent the exercise of governmental power which might remove the prosecutorial burden from the government and place it on defendants, but the method by which it is accomplished is simply the exclusion of evidence—answers which are or have been compelled out of the mouth of the person against whom they are sought to be used.

Thus it is important to clarify whether (a) the basis for the possible exclusion of the tax return is that statutorily compelling his self-incriminating answers violated the purposes of the Fifth Amendment and tainted the answers when Garner filed the tax return, so they were excludable by his privilege when later introduced in a criminal proceeding, or (b) that while Garner was not privileged to refuse to answer the questions, he is privileged to prevent statutorily compelled answers from introduction in a criminal trial because they then give rise to a cognizable Fifth Amendment danger. The first approach, by recognizing a privilege not to answer, which the majority not only prefers but apparently thinks required by the nature of the privilege, balances a prospective threat that the answer may in the future incriminate in a judicial proceeding against the government's need for non-criminal information. It creates a prophylactic rule which states that the non-criminal social purpose is not as compelling as the danger of governmental circumvention of the privilege's purposes,

[9] The government may compel self-incriminating admissions from a witness so long as he is given immunity from their use against him.

but does so in a context where the government's need is certain and the danger speculative. The choice is not necessarily between serving one or the other. If one limits the privilege to the point when compelled evidence is introduced, there is no longer a socially neutral purpose being served, and the threat of a breakdown of the accusatorial system and a whipsawing of defendants is a reality.

The Supreme Court's relatively few pronouncements on the application of the privilege in the area of regulatory self-disclosure inquiries leave open the question of which approach is appropriate. As the majority indicates [Appendix p. 6], the Court has distinguished between two different types of disclosure statutes: those designed to elicit information about specific activities from a specific group of individuals inherently suspect of criminal activities,[10] and those asking questions neutral on their face, of the public at large, for valid neutral social purposes, and which require self-reporting. Despite the dictum in *Sullivan,* the Court has never recognized a privilege to refuse to answer questions of the second variety, whether the privilege is asserted by a total failure to file a return or claimed as to specific questions. *A priori,* the Court has never validated the majority's notion that the privilege is available and must be asserted by a refusal to answer neutral questions, rather than by answering and seeking to exclude the answers if they are later offered at a criminal trial. In fact, the majority completely misconstrues the point of the distinction between the two types of inquiries, which, if anything, suggests that the course Garner took in invoking his privilege was the preferable, if not the only,

[10]For instance, possessors of unlawful firearms, persons engaged in unlawful wagering activities, communists, and persons dealing in unlawful drugs.

method.

Sullivan held that the privilege did not justify a total failure to file a tax return, since a less extravagant method of claiming the privilege was available. In the *Marchetti-Albertson*[11] line of cases the Court, reversing itself,[12] recognized the privilege as a defense to a prosecution for failing to register and file returns under a variety of non-criminal statutes requiring disclosures of activities in areas "permeated with criminal statutes." The Court distinguished *Sullivan's* requirement that the return be filed by pointing out the differences in the two types of inquiries involved (390 U.S. at 48-9); thus the distinction which the majority relies upon serves to distinguish cases in which the defendant may refuse to file and those in which he may not, and is somewhat irrelevant in Garner's case. Nevertheless, as the *Marchetti* line of cases are the only instance in which the Court has excused a failure to answer a regulatory inquiry, the reasons underlying the distinction are instructive in determining the issue of when the privilege applies in the regulatory context.

The original reason for the distinction was that a court

[11]Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States, 395 U.S. 6 (1969); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

[12]Marchetti overruled United States v. Kahriger, 345 U.S. 22 (1953), and Lewis v. States, 348 U.S. 419 (1955). The Court had reasoned that since the registration requirement and return dealt with prospective acts, there was no valid claim of privilege involved, because the statutory compulsion to file could be avoided entirely at the choice of the defendant, by not entering voluntarily on the conduct which made failure to file criminal. Marchetti rejected this concept of implied "waiver" (strictly speaking, it is not a waiver at all) because the filing requirement focused on past acts and because the privilege was held to apply to prospective acts. While the Court's rejection of the "waiver" in Marchetti is not controlling, the majority opinion neither reflects the Court's hostility to implied "waivers" nor does it give the required scrutiny of the circumstances in the present case before implying such a "waiver." *See* 390 U.S. at 51.

trying a "failure-to-file" prosecution, in the case of questions directed at suspect groups in areas permeated with criminal statutes, could be far more certain that the reason for the refusal to file was that the answers called for were incriminating. *Albertson, supra,* at 79. See *California v. Byers,* 402 U.S. 424 (1971), at 469 (Brennan, J., dissenting). The objection of the *Sullivan* court to extending the privilege to allow a complete failure to file a tax return was that it made the taxpayer the sole judge of the merits of his claim. Under the standard of *United States v. Burr,* 25 F. Cas. 38 (1807), and *Hoffman v. United States,* 341 U.S. 479 (1951), a claim of privilege must be honored when it appears that a "real and substantial" possibility exists that an honest answer would provide a link in the chain of incriminating evidence. While the witness cannot be compelled to prove the basis of his claim, since to do so would abandon it, the claim is subject to review to prevent obviously frivolous claims. Because of the impossibility of administratively reviewing a claim if no return is filed, the extension of the privilege in *Sullivan* would have subjected the tax system to bogus invocations of the privilege. Because of the difference in the questions, the danger of fraudulent claims was far less compelling in the *Marchetti* line of cases, the relevance of the distinction being to determine when a defendant could fail to file a return.

The rationale of the distinction—the *Sullivan* Court's fear of making the taxpayer judge of the merits of his case—clearly cuts in favor of the course Garner took. By answering and asserting a privilege at trial, Garner subjects his claim of privilege to the acid test: not whether the answer has a substantial possibility of being incriminating, but whether it is

so in fact. The majority's suggestion that Garner's failure to claim the privilege on the return makes him "the final arbiter of the merits of the claim. . . . " [Appendix p. 7—"Had Garner chosen to claim his privilege on the tax return, the government would ultimately have had to decide whether it was willing to grant him immunity in order to obtain the answer.[18] But the granting of immunity must be in the hands of the government, not in the hands of taxpayers who provide incriminating answers rather than assert their privilege.[19]" ; Appendix p. 8—"We have held that a taxpayer must assert his privilege against self-incrimination in his return in response to a specific question. Just as he had no right to be immune from questioning, likewise he is not free to immunize himself from prosecution by volunteering information to the government. To hold otherwise would allow any witness in any proceeding the later protection of the Fifth Amendment to frustrate the use of information derived from earlier testimony when that witness failed to invoke his privilege. If this were the law, immunity from use of incriminating information might well be achieved without government approval by merely including it in a tax return."; and note 19], is completely illogical. Garner's interjection of the privilege at trial, after answering, is the only situation in which he does not, to some extent, judge the merits of his claim.[13] Hence, Garner would not possibly immunize himself from prosecution by "volunteering" information on a tax return. To the extent that a criminal includes information not reasonably called for by the questions, his answers are not statutorily compelled, and hence not subject to a claim of privilege when introduced at trial. As to those answers

[13] *See* 86 Harv. L. Rev. 914, 915 n. 9 (1973).

compelled by statutory penalty, the judge hearing the claim of privilege will determine whether the answers are in fact incriminating, rather than, as under the majority's preferred approach, whether there is a substantial possibility that refused answers might incriminate.

A second reason for the distinction is that when the area of inquiry is permeated with criminal statutes, anyone filing a return, even one claiming a privilege, identifies himself as a criminal—thereby undermining the accusatorial system at the investigatory stage. Again, the thrust of the distinction is aimed at determining when a complete failure to file is justified, but suggests that when the intrusion on Fifth Amendment values is less immediate, the defendant should be relegated to an invocation of the privilege in a manner which gives greater scope to the government's interest, such as Garner's method.

The third purpose of the distinction is that a statute which directs inquiries to an area permeated with criminal statutes alerts the Court to the predominance of prosecutorial over neutral goals and the concealment of Fifth Amendment dangers. The Court emphasized that every question and requirement in *Marchetti* tended to identify the registrant as a criminal, unlike *Sullivan,* where some if not all of the questions served only neutral purposes, even when directed at criminal income. As a result, the Court gave less deference to the non-criminal goals, which it recognized in *Marchetti,* allowing them to be defeated to prevent governmental circumvention of the accusatorial system. In the present case, as in *Byers* and *Sullivan,* the questions do not reveal an overt attempt to whipsaw defendants. The relevance of the difference is either that regulatory statutes

which are neutral and present statistically small possibilities of compelled self-incrimination do not come within the ambit of the privilege at all, or it goes to when the privilege may be claimed. Since the majority and I agree that the privilege applies in this case, presumably the majority offers the distinction for the latter reason. Again, the majority draws precisely the opposite conclusion from that warranted by the rationale for the distinction. By allowing the suspect *Marchetti* variety statute to be challenged by a total failure to file, and relegating challenges to neutral non-suspect *Sullivan* type statutes either to be made on the return, or by answering and asserting a privilege at a subsequent trial (the point has never been decided), the Court indicated that when the government is pursuing legitimate non-criminal goals, the application of the privilege should be in a manner that allows as narrow an interference as possible consistent with the preservation of constitutional protection. The path Garner used is more consistent with the Court's rationale than the majority's approach. The fact that answering fulfills entirely the neutral aims of the questions suggests that GArner's approach may be ultimately determined by the Court as the proper method of reconciling the government's neutral aims with the privilege.[14]

Nor is there anything in the plurality opinion[15] in

---

[14] In Marchetti Chief Justice Warren would have adopted the use immunity desired by the government in order to preserve the neutral taxing purpose of the statute, despite the predominance of impermissible criminal purposes served. He felt that Sullivan and Marchetti inquiries should not be treated differently—in both situations the offense to the purposes of the privilege results from transmittal of the information for prosecutorial use, and in both situations restriction on the use of answers adequately protects the defendant. 390 U.S. at 81. The majority in Marchetti rejected his approach because it thought the neutral and criminal goals of the statute unseverable.

[15] Four justices dissented, thinking Marchetti controlling. Justice Harlan concurred in the result reached by the plurality, but for substantially different reasons.

California v. Byers, supra, on which the majority relies [Appendix pp. 6 and 7, notes 17 and 18], to support the majority's decision that Garner's answers are admissible at trial because he did not claim a privilege on the return; if anything, the plurality opinion suggests that in the case of a non-suspect *Sullivan* type inquiry which poses a low probability of incrimination when assessed over the entire class at whom the questions are directed, the balance of interests is such that even a person facing a high risk of incrimination must answer initially, and assert his privilege at trial. The California Supreme Court held that absent a use immunity, Byers was privileged to refuse to stop and identify himself when involved in an accident if to do so would incriminate him. The plurality, noting the statute's neutral purpose, need for self-reporting, direction at the general public, and low danger of self-incrimination, thought the case controlled by *Sullivan.* As I read the plurality's opinion, the question they were answering was whether Byers' failure to stop and identify himself, the equivalent of failing to file in *Sullivan,* was constitutionally privileged. The California Supreme Court said it was; the plurality said that, as in *Sullivan,* no use immunity was required. Particularly because the plurality thought Byers' identity non-testimonial under *Schmerber v. California,* 384 U.S. 757 (1966), its rationale indicates that the decision is limited to the precise issue of whether a failure to stop is privileged, and decides neither what may be required thereafter,[16] nor whether any of the information derived after the stop may be introduced at a criminal trial. Read this way, the *Byers*

[16] 402 U.S. at 434 n. 6.

plurality is *Sullivan*—it clarifies the standards by which failure to answer or file is to be judged in light of *Marchetti.*

The reasoning of the plurality opinion supports Garner's method of asserting his privilege; only a slight extension of the plurality's approach would require it. The rationale of the plurality was that since the non-criminal interests in obtaining a driver's identity outweigh the danger of incrimination drivers face as a class, the privilege cannot be asserted as a defense for failing to answer by a particular driver, even if he faces a substantial risk of incrimination. Again, the Court's solicitude for non-criminal interests served by disclosure supports Garner's method of claiming his privilege. Were one to disregard both the fact that the plurality considered the compelled identity non-testimonial and hence not subject to a claim of privilege, and its explicit disclaimer of having decided whether privilege was available after identity was disclosed,[17] and to read the plurality's opinion to hold that whenever the neutral interest in receiving the answers outweighs the dangers of incrimination posed to the class, the individual must answer,[18] then Garner's method of asserting his privilege is the only one available. To assess the operation of the statute from a societal overview, in terms of the interests served and the risks of incrimination posed, would determine whether the disclosure requirement was an overt attempt to construct a reporting system intended to whipsaw defendants and circumvent Fifth Amendment policies. If it were not,

[17] *Id.*

[18] Such a reading of Byers would effectively "overrule" the suggestion of the Sullivan dictum. The information required by particular questions on tax returns poses a low danger of incrimination when viewed as a statistical matter—probably lower than that faced by persons stopping to give their identity after car accidents—and otherwise conforms to all of the indicia of neutrality found important by the Byers plurality. The answer would therefore have to be given on the tax return.

it might be appropriate not to defeat the regulatory interest served by disclosure even if the particular case revealed a high potential for prosecutorial use of the answers.

This would not mean, as the majority apparently thinks, that the privilege is thereafter unavailable to exclude the compelled answers;[19] in fact, it must be available to reconcile the requirement that regulatory inquiries be answered with the need for constitutional protection. The approach is appropriate, both in judging a complete failure to file and to preclude the privilege on the return, only if the compelled witness is allowed to assert his privilege when the social purposes which the balance is intended to accommodate are served and the government is using the information solely to convict him. A decision not to extend protection to a "witness" who anticipates that answering will incriminate him in a subsequent criminal trial balances completely different interests than those involved when the answers are introduced at trial. At trial, as a majority of the Justices in *Byers* indicates (402 U.S. at 437-42, 459), the risk of incrimination weighed must be that faced by the particular individual compelled to answer. The majority, in seeking to distinguish the governmental compulsion in this case from that declared constitutionally impermissible in *Marchetti* and *Miranda*, emphasizes the fact that

---

[19] It is difficult for me to determine how the majority reads the Byers plurality opinion. The majority, at the same time it cites Byers for the proposition that the returns should not be excluded [Appendix p. 6], advances the incompatible argument that Garner was privileged not to respond; the whole point of the Byers plurality opinion was that Byers was not so privileged. If, as did the original dissent (p. 11), the majority reads Byers to mean that the compelled identity is admissible in a subsequent criminal trial, then the implied "waiver" position the majority advances as the ground for its decision is untenable. The identity in Byers would be admissible because neutral regulatory inquiries do not raise a valid privilege claim despite high individual risks of incrimination—for precisely the same reason, Garner would not be privileged to refuse to answer (*see* n. 18, *supra*), and his answers would be admissible at trial.

the group queried by income tax returns, on the whole, faces a low risk of self-incrimination [Appendix p. 7—"The questions asked on the tax return were completely neutral; only Garner knew a response might be incriminating. As to all taxpayers in general, there was only 'compulsion' to provide the government with the information it was entitled to demand."] If the majority means to imply that Garner's claim at trial should be judged by that standard, then the majority flies in the face of its own recognition that the privilege is personal and the fact that under *Hoffman*, *Burr*, and a welter of other cases, the privilege is available when the individual faces a substantial possibility of self-incrimination—not on a showing of illicitly intended governmental action.[20] An approach which recognizes the privilege only when a question manifestly intends to incriminate would open a broad path for disingenuous circumvention of the purposes of the privilege.

Whether the Court ultimately holds that a taxpayer has a privilege to refuse to answer particular questions on his return, or, under the logic suggested by the *Byers* plurality opinion, holds that a taxpayer must first answer the questions and assert the privilege at trial, Garner is entitled to have his tax return excluded.

Under the latter approach, Garner must file a complete return, and the privilege is returned to its historic setting—that of the criminal trial. To have his claim of privilege sustained and the return excluded, Garner must show that he answered pursuant to a statutory directive which contained sanctions

---

[20] A "group focus" for assessing the risk of incrimination posed by an inquiry advocated by the majority was in fact rejected by a majority of the Court in Byers.

for not answering, and that his answers were incriminating. That is precisely what he has shown in this case. 26 U.S.C. § 7203 makes it a crime to fail to file any return, pay any tax, or supply any information. Answers are not optional or voluntary—the statute prescribes up to $10,000 fines and one year in jail for non-compliance. 26 U.S.C. § 7206 makes it a crime for a person to make and subscribe any return "which he does not believe to be true and correct in every material matter. . . . " 26 U.S.C. § 7203 commands that those subject to tax answer all questions posed in the return. On the standard 1972 1040 Form, immediately above the signature line, one reads: "under penalties of perjury I declare that [this return] is true, correct, and complete." At line 44 of the form the question asks taxpayer to state "Other" income, telling him to "(state nature and source". The "1972 Instruction for Form 1040", (Point 1, page 8), states, "Line 44—Other—use this line to report and tell the source of any income you cannot find a place for on your return or other schedules. . . . " At page 3, column 1, the taxpayer is cautioned: "Don't forget to show occupations in space[s] in upper right corner just below social security blocks," and then at page 6: "you have to report all income in whatever form received." Among the examples is included "Embezzled or other illegal income." Thus, there is no doubt that Garner's answers were statutorily compelled within the meaning of the Fifth Amendment; they were incriminating and should have been excluded under the second approach. The government's interest in the coercion, when introducing the answers at trial, is solely prosecutorial; as to that purpose, the Fifth Amendment embodies the constitutional decision that governmental interests in criminal

law enforcement standing alone do not justify the forced extraction and subsequent introduction of the evidence.[21]

On the other hand, if the privilege ultimately is available when filling out a tax return, Garner still should have been privileged to have his returns excluded at his trial; under *Mackey* the privilege may be asserted at either time. The majority's opposite conclusion can be correct only if there were no constitutional violation involved in Garner's answering the questions. Despite the majority's assertions about the nature of the privilege, the basis of the majority's decision appears to be that Garner's answers were given voluntarily:[21a] "Garner provided the source of his income on his return and failed to invoke his privilege." [Appendix p. 5] Since the source of Garner's income is information which he is required to give under the threat of § 7203, his providing it is objectively involuntary. Nevertheless, the majority relies on the premise that since Garner might have refused to answer, by responding he evidenced that the answers were not subjectively compelled by the statute—hence voluntary for constitutional purposes. Because his answers are not produced by the proscribed compulsion, the majority reasons that as to him, the statute does not violate the purpose of the Fifth Amendment, and there is

---

[21] *See* 85 Harv. L. Rev. 269, 270 (1971).

[21a] The majority, in seeking to avoid the critical factual inquiry of whether Garner's incriminating answers were "provided" of his own free will or because of compulsion to answer, contends that the question of voluntariness here "diverts from the critical issue." [Appendix p. 7] In fact, as in all Fifth Amendment cases, it is the critical issue. Although the character of governmental conduct may vary, a statutory penalty for not answering is a compulsion to answer [compare—Appendix p. 7—"As to all taxpayers in general, there was only 'compulsion' to provide the government with the information it was entitled to demand. As to Garner specifically, there was 'compulsion' *to incriminate*."] , and an involuntary answer coerced by that compulsion violates the privilege if it incriminates.

no constitutional violation.[22] Note that the assumption that the answers were subjectively voluntary makes totally irrelevant the majority's argument that the nature of the privilege precludes Garner's objection at trial—if there is no constitutional violation, there is obviously no privilege at trial.

The majority's assumption that Garner's answers were subjectively voluntary rests entirely on the analogy, derived from *Shushan v. United States,* 117 F.2d 110 (5th Cir. 1941), and *Stillman v. United States,* 177 F.2d 607 (9th Cir. 1949), and recited by the majority opinion [Appendix p. 5], to the consequences of failing to invoke a privilege in a civil trial. Just as the failure to invoke the privilege evidences that the answers given in the civil trial are voluntary and are not subject to subsequent exclusion, the analogy runs, so here Garner evidenced that he was not coerced to answer, and therefore his answers may not be excluded. The analogy is totally unsound for a variety of reasons. First, *Mackey* rejects the logic. Mackey was privileged not to file his wagering tax return—the Court did not treat his doing so as indicating his answers were voluntary.

Second, the majority's analogy is unsound because the applicability of the privilege in judicial proceedings is historically more certain than in other contexts, thereby making an answer on a tax return far less persuasive evidence that the answer is given voluntarily, rather than as a result of the penalties for not answering. "Courts indulge every reason-

---

[22] I have discussed the voluntariness of Garner's answers in terms of whether there is a violation of his privilege, rather than under the rubric of waiver. Logically, if his answers are not extracted by the operation of the statute, there is never a constitutional claim to be waived. Nevertheless, the difference is one of form only. Under the rubric of waiver, the argument is that a constitutional claim is raised by statutory coercion which is not waived by answering unless the answers are voluntary.

able presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *Carnley v. Cochran,* 369 U.S. 506, 516 (1962). In order to find that by answering Garner has relinquished the constitutional protection he would otherwise enjoy, the government should logically have to rebut the presumption that his answer was involuntary—the majority presumes precisely the opposite. The factual inference that his answers are voluntary rests on the presumption that Garner knew of the availability and scope of his privilege. There is no evidence in this record to indicate that Garner knew of the privilege, and under *Zerbst's* standard for the waiver of a *known* right, the court is directed to indulge the reasonable presumption that he did not. The presumption is reasonable not only because there is absolutely nothing on the return itself to make him aware of the privilege, and because it is not common knowledge that one may refuse to answer questions on a tax return, but also because it is still uncertain, to lawyer and layman alike, that such a privilege indeed exists.

The analogy is further unsound because even in the civil case to which the majority analogizes the tax return, if the witness were prevented from exercising his privilege by an erroneous rejection of his claim, a threat of contempt, or some other sanction being placed on his free exercise of the privilege, then when the evidence is later introduced, he has not voluntarily waived his objection and the court must hear it. That is precisely the issue in Garner's case which the majority has assumed away, calling his answers "voluntary."

Garner's failure to invoke the privilege is the product of the same coercion which produced his incriminating

answers—the threat of a criminal conviction under § 7203. The majority ignores the fact that when Garner answered the questions on the tax return, the only way for him to get a determination of the merits or applicability of his claim of privilege, if rejected by the Tax Service, was by asserting the privilege as a defense in a subsequent prosecution for failure to file a complete return. In a judicial proceeding if a judge disallowed his claim of privilege, Garner could go on and testify, without sanction. Here he must choose between alternative criminal prosecutions under either § 7203 or the gambling laws.

In this situation the majority is precluded from treating Garner's answers as "voluntary" by *Garrity v. New Jersey*, 385 U.S. 493 (1967), and the logic of a line of cases,[23] recently reaffirmed by a unanimous Court in *Lefkowitz v. Turley, supra,* which indicate that when a sanction is placed on the free exercise of the privilege, the resulting answers are not voluntary, and their subsequent use violates the Fifth Amendment. In *Garrity* the Court confronted a situation in which police officers who were to be questioned during an investigative hearing were threatened with removal from office if they refused to answer the questions. The officers answered; the answers were admitted over their claim of privilege at a subsequent criminal trial, and the Court reversed. "The Court . . . held that in the context of threats of removal from office the act of responding to interrogation was not voluntary and was not an effective waiver of the privilege against self-incrimination. . . . " *Lefkowitz v. Turley*, slip opinion at 10. *Garrity* defined a waiver as

[23] *See, e.g.*, Spevack v. Klein, 385 U.S. 511 (1967).

"the free choice to admit, to deny, or to refuse to answer." In *Garrity* the threat of a civil sanction (which arguably served valid non-criminal purposes) was sufficient to make the answers constitutionally involuntary. Here the threat of a criminal sanction—a conviction under § 7203 if the court rejects his claim of privilege—should likewise make the answers involuntary as a matter of law.

The analysis of the particular facts of this case which the majority foregoes emphasizes Garner's dilemma. He has no effective procedure to invoke the privilege on the return even if he were aware he had one.[24] The provisions of the Internal Revenue Code applicable to gamblers provide different rules in calculating taxable income than those available to non-gamblers. A person whose income is derived from wagering may deduct his wagering losses only to the extent of his winnings from wagering. 26 U.S.C. § 165(d). Gambling losses may not be carried back or carried over [See 5 Mertens, Law of Federal Income Taxation § 28.85], and a gambler whose losses offset his winnings must nevertheless report all winnings as gross income and losses as deductions. *McClanahan v. United States,* 292 F.2d 630, 631 (5th Cir. 1961), *cert. denied,* 368 U.S. 913. Thus, as a practical matter, in order for Garner to claim a privilege on the return he would have to enter a claim of privilege at the lines calling for his source of income, his profession, and throughout the return where step by step calculations are called for. He would have disclosed only his name and taxable income figure. This would subject him to prosecution for failure to file a return at all, *United States*

[24] 86 Harv. L. Rev., *supra*, at 916 n. 13.

v. Klee, No. 73-2741 (9th Cir., Mar. 27, 1974), *United States v. Porth*, 426 F.2d 519 (10th Cir. 1970), and the substantial risk that a court would determine that he was not privileged to do so under *Sullivan*. If he only claimed a privilege on the line where his profession or source of income was requested, he would reveal by the method of his calculations that he was a gambler. Thus the "free choice" to refuse to answer required by *Garrity* is missing—in this case the choice is to run the risk of being convicted under § 7203 because of a judicial determination that he answered too few questions, that his privilege did not extend to certain subjects, or that his claim of privilege was invalid because under *Hoffman's* standard he did not face a real possibility of incrimination.

The strongest indication that his answers are involuntary, however, is provided simply by the fact that no court has ever held there is a privilege which excuses failure to answer questions on the return. I venture that no lawyer whom Garner consulted when filling out the return could have told him with certainty that the law recognized such a privilege—only that it might. He had to run the risk of a criminal conviction to establish the existence of his privilege. Because of that threat, his failure to claim a privilege on the return does not indicate that his answers were not coerced by penalties under § 7203; on the contrary, as an evidentiary matter it strongly appears the answers are involuntary. Under *Garrity*, the majority is precluded as a matter of law from considering the answers voluntary, or from holding that the privilege is not applicable at trial to exclude them.

The majority, in support of the decision not to exclude the return, suggests that Congress should decide whether a "use immunity" is appropriate (n. 20). It seems to me a

fundamental of constitutional adjudication that confronted with a legislative or prosecutorial action arguably in conflict with the Fifth Amendment, regardless of what mix Congress might choose among prosecutorial and taxing purposes, it is the duty of the court to decide whether the evidence violates the constitutional privilege. "A witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Adams v. Maryland*, 374 U.S. 179, 181 (1954). If, as the majority assumes, Garner was privileged not to answer the questions, then the constitutional violation involved in coercing him involuntarily to answer requires that the answers be excluded at trial. The government may not use the information because it may not initially compel it.

Moreover, regardless of when the privilege first becomes applicable, this case involves a situation in which a judicial recognition[25] of "use immunity" is entirely appropriate for a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar v. United States*, 406 U.S. 441, 446 (1972). The Court has recently reaffirmed the principle that the price the government must pay to pursue important neutral goals is sufficient immunity from the prosecutorial use of required information. *Lefkowitz v. Turley, supra*, at slip 8, 9, 11, 14. The rejection of use immunity in *Marchetti*, and by Justice Harlan in *Byers*, cited by the

---

[25] *E.g.*, Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

majority, was for reasons inapplicable to the present situation.[26] Here, the imposition of a use restriction effectuates the paramount Congressional purpose of raising revenue by removing the dangers which lead most criminal income to be either not reported or reported under misleading labels.[27] Because the immunity would apply only to prosecutions unrelated to the tax laws, it would affect only a small proportion of the criminal prosecutions using tax returns. Here, unlike *Marchetti,* the incidental criminal purpose is severable from the revenue raising purpose in obtaining information necessary for determining tax liability, making a use restriction appropriate to prevent the unconstitutional prosecutorial use of answers while advancing the overriding

---

[26] In Marchetti the majority rejected use immunity because the prosecutorial purposes of the wagering tax statute were indicated on the face of the statute and were unseverable from the incidental neutral taxing purpose. The majority was unwilling to substitute its own judgment for Congress's as to the appropriate mix between criminal and taxing purposes. That reason is clearly inapplicable under the general income tax statutes–any incidental prosecutorial use of the information can appropriately be severed from the paramount purpose of raising taxes.

Justice Harlan rejected use immunity in Byers for a reason which indicates it is appropriate in this case. Under Justice Harlan's own approach to balancing, the factor which ultimately tipped the scale in favor of finding the privilege inapplicable was that the imposition of a use immunity on socially necessary information would have the effect of defeating valid criminal law enforcement purposes which did not depend on compelled information. Use immunity would place what he considered a difficult burden on proving evidence was independently obtained, defeating prosecutions in which there was no taint. However, in Byers the police served both data-gathering and prosecutorial functions–hence the difficulty in proving that information compelled had not been used. In the present case different branches of the executive conduct the two functions, and it is possible to keep the tax returns insulated. Under C.F.R. § 301.6103(a)-1(f) and (h), returns can only be transmitted for inspection or use on a demand from the Justice Department, not at the Service's initiative, except in tax prosecutions. The regulations could be amended to prevent transmittal and procedures implemented to ease the difficulty of proving freedom from taint. Because of the relative ease with which the holes in the present "confidentiality" system of § 7213 can be plugged, I doubt valid prosecutorial efforts will be undermined by a use immunity on information in tax returns.

[27] *See* Bittker, *Federal Income, Estate and Gift Taxation* 117 (3d ed. 1964).

Congressional purpose in passing the statute–taxation.[28]

The majority declares that accepting Garner's claim of privilege would create the "disquieting" and "unpalatable" [Appendix p. 8] result that every public response would be subject to a claim of privilege when introduced in a criminal trial. In fact, every response would not be subject to a claim of privilege because many governmental inquiries are not accompanied by statutory penalties for refusing to answer. As to those that are, the majority purports to recognize a privilege not to answer. Thus the sum total of answers over which the majority is dismayed are those which are given when a privilege might have been claimed, but was not. Of those, if the answer was voluntary in fact, then it may not be shielded by a claim of privilege. This leaves as the real source of the majority's anxiety the prosecutorial windfall case where no privilege was claimed but the answer was involuntarily given. That is an inadequate constitutional basis for the majority's decision.[29]

The judgment ought to be reversed.

KOELSCH
United States Circuit Judge

---

[28] The idea of a use restriction on information required by regulatory inquiries has been almost uniformly approved by commentators. *See e.g.*, Friendly, *supra*, at 720; Mansfield, *The Albertson Case Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 S. Ct. Rev. 103, 159-66; McKay, *supra*, at 232, 86 Harv. L. Rev., *supra*, at 922.

[29] The majority's concern . . .

> . . . appears to mean that current technological progress enabling the Government more easily to use an individual's compelled statement against him in a criminal prosecution should be matched by frank judicial contraction of the privilege against self-incrimination lest the Government be hindered in using modern technology further to reduce individual privacy.

402 U.S. at 464 (Brennan, J., dissenting).

ORDER DENYING PETITION FOR REHEARING

In the United States Court of Appeals for the Ninth Circuit.

ROY D. GARNER, Appellant, vs. UNITED STATES OF AMERICA, Appellee.

No. 71-1219.

[FILED JUNE 11, 1974]

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN and WALLACE, Circuit Judges*

Appellant's Petition for Rehearing is denied.

*Honorable Joseph T. Sneed was inducted subsequent to the submission of this case and, therefore, did not participate in the decision or the vote on the Petition for Rehearing.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States.

No. A-1271.

ROY D. GARNER, Petitioner, v. UNITED STATES.

Upon consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9, 1974.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this Tenth
day of July, 1974.

LETTER FORWARDING ABOVE

From the Office of the Clerk of the Supreme Court of the United States, Washington, D. C. 20543.

July 11, 1974.

To Burton Marks, Esquire, 8383 Wilshire Boulevard,

Suite 510, Beverly Hills, California 90211.

RE: Roy D. Garner v. United States, A-1271.

Dear Mr. Marks:

Your application for an extension of time in which to file a petition for writ of certiorari in the above-entitled cause has been presented to Mr. Justice Douglas who, on July 10, 1974, signed an order extending your time to and including August 9, 1974.

A copy of the Justice's order is enclosed.

Very truly yours,
MICAHEL RODAK, JR., Clerk
By Francis J. Lorson, Deputy Clerk

Enclosure
FJL:lab
cc: Honorable Robert H. Bork
Solicitor General of the United States

Clerk, United States Court of Appeals for the Ninth Circuit (Your No. 71-1219)

APPENDIX D

EXCERPT FROM FIRST OPINION OF THE NINTH CIRCUIT COURT OF APPEALS [JUNE 5, 1972]

"None of appellant's remaining contentions has merit or is of sufficient substance to warrant discussion."

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on AUGUST 8, 1974, I served the within PETITION FOR WRIT OF CERTIORARI, NO. A 1271, GARNER v. UNITED STATES, on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 [3 copies]

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 [2 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on AUGUST 8th, 1974, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

Supreme Court, U. S.
FILED
JAN 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT AND ADDENDUM TO PETITION FOR WRIT OF CERTIORARI WITH EXHIBITS

Associate Counsel

JONATHAN K. GOLDEN, ESQ.
8383 Wilshire Boulevard, 510
Beverly Hills, California 90211
(213) 655-5011

BURTON MARKS, ESQ.
a member of
LAW OFFICES OF BURTON MARKS
A PROFESSIONAL CORPORATION
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
(213) 655-5011

Attorney for Petitioner

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

		Page
Supplement and Addendum to Petition for Writ of Certiorari With Exhibits		1
Exhibits:		
"A"	1973 Individual Income Tax Return Roy D. & Rowena Garner	1
"B"	Letter explaining reason for type of filing made	2
"C"	Registered letter from Internal Revenue Service re 1973 tax return advising return as forwarded "is not acceptable" and not a "return"	4

TABLE OF AUTHORITIES CITED

Case	
Giglio v. United States, 405 U.S. 150	3
Graham v. Richardson, 403 U.S. 365	3, 4
Statutes	
U. S. Constitution, Fifth Amendment	2, 3
26 U.S.C. § 7203	2, 3
Text	
Job 3:25	2

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT AND ADDENDUM TO PETITION FOR WRIT OF CERTIORARI WITH EXHIBITS

To the Honorable Presiding Justice and Associate Justices of the Supreme Court of the United States:

Petitioner requests leave to file this Supplement and Addendum to the Petition for Writ of Certiorari pending before this Court.

As of the date of dictation of this Supplement (January 6, 1975) no response has yet been received from the attorney for the plaintiff, respondent herein.

The reason for this Supplement and Addendum to

Petition becomes obvious in context of the background of the Petition.

The Court of Appeals for the Ninth Circuit Majority indicated in their decision below (501 F.2d 228; Appendix to Petition for Certiorari, page 9) that the taxpayer must assert his Fifth Amendment position at the time of the preparing or filing of the tax return:

> "Essentially, the question is whether in this situation the Fifth Amendment is a right which can be invoked retrospectively or whether it is a privilege which must be claimed when the incriminating information is requested. Here, we hold it to be a privilege which Garner should have asserted in his tax return. Having failed to do so, he may not claim its benefit during his trial."

This decision was rendered in the face of the Dissent which pointed out that § 7203 of Title 26 U.S.C. made the assertion of the right a misdemeanor.

This situation now, as presented to the Court in this Supplement, brings to mind Job's lament (3:25)

> . . . "For the thing which I greatly feared has come upon me, and that which I was afraid of is come unto me" . . .

because:

1. Petitioner filed his 1973 tax return asserting his Fifth Amendment privilege against incrimination, along with an explanatory letter (see Exhibits A and B annexed hereto).

2. The Internal Revenue Service, upon receipt, declared petitioner's tax return to be "not acceptable"

and not a "return" and suggested that criminal penalties might be forthcoming under 26 U.S.C. § 7203 (see Exhibit C annexed hereto).

In the instant case, the United States Government, through its attorneys, argued to the court below (and the Majority endorsed the argument) that the privilege against self-incrimination had to be asserted at the time the tax return was filed. The same Government, through its Internal Revenue Service, does not agree. This would seem to be a classic case of the left hand not knowing what the right hand is doing. *Cf. Giglio v. United States*, 405 U.S. 150 (1972).

In addition to the above supplementary information, it is further submitted that the Petition for Writ of Certiorari should be granted because the Majority opinion in the Ninth Circuit used as a basis of its analysis the distinction between "right" and "privilege" as applied to the constitutional mandates contained within the Fifth Amendment. That proposition is no longer viable, for in *Graham v. Richardson*, 403 U.S. 365, 375 (1971), this Court declared:

> " . . . [T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963); *Shapiro v. Thompson*, 394 U.S., at 627 n. 6, 89 S.Ct., at 1327; *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970); *Bell v. Burson*,

402 U.S. 535, 539, 91 S.Ct. 1586, 1589,
29 L.Ed.2d 90 (1971)."

CONCLUSION

The decision of the Ninth Circuit Court of Appeals affirming the judgment in the instant case was based on nothing more than a semantical quibble over definitions of the word "right" as opposed to the word "privilege." The Court of Appeals arrived at a conclusion diametrically opposed to any realistic and practical application of the law.

The Petition for Writ of Certiorari should be granted and the judgment of conviction, and of the Court of Appeals, should be reversed.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

JONATHAN K. GOLDEN
Associate Counsel

EXHIBITS

1040 US Department of the Treasury—Internal Revenue Service Individual Income Tax Return 1973

For the year January 1–December 31, 1973, or other taxable year beginning ..... 1973, ending ..... 19.....

Please print or type

Name (If joint return, give first names and initials of both): ROY D. & ROWENA — Last name: GARNER

Present home address (Number and street, including apartment number, or rural route): 501 N. HARBIN

City, town or post office, State and ZIP code: CARSON CITY NEVADA 89701

COUNTY OF RESIDENCE: WASHOE

Your social security number: 565 34 2357

Spouse's social security no.: 562 30 6316

Occupation — Yours ► REFUSE TO ANSWER — Spouse's ► SELF-EMPLOYED HOUSEWIFE

Filing Status—check only one:

1 ☐ Single
2 ☒ Married filing joint return (even if only one had income)
3 ☐ Married filing separately. If spouse is also filing give spouse's social security number in designated space above and enter full name here ►
4 ☐ Unmarried Head of Household
5 ☐ Widow(er) with dependent child (Year spouse died ► 19)

Exemptions — Regular / 65 or over / Blind

6a Yourself . . . ☒ ☐ ☐ — Enter number of boxes checked ► 2
b Spouse . . . ☒ ☐ ☐
c First names of your dependent children who lived with you: PHYLLIS, JOHN — Enter number ► 2
d Number of other dependents (from line 27) . . . ►
7 Total exemptions claimed . . . . . ► 4

8 Presidential Election Campaign Fund.—Check ☐ if you wish to designate $1 of your taxes for this fund. If joint return, check ☐ if spouse wishes to designate $1. Note: *This will not increase your tax or reduce your refund.* See note below.

Income

9	Wages, salaries, tips, and other employee compensation. (Attach Forms W-2. If unavailable, attach explanation)	9	10,925
10a	Dividends ($ ..... See instructions on page 6.), 10b Less exclusion $ ....., Balance ►	10c	
10d	(Gross amount received, if different from line 10a . . . . $ .....)		
11	Interest income	11	375
12	Income other than wages, dividends, and interest (from line 38)	12	
13	Total (add lines 9, 10c, 11, and 12)	13	
14	Adjustments to income (such as "sick pay," moving expenses, etc. from line 43) .	14	
15	Subtract line 14 from line 13 (adjusted gross income)	15	

SEE LETTER ATTACH

- If you do not itemize deductions and line 15 is under $10,000, find tax in Tables and enter on line 16.
- If you itemize deductions or line 15 is $10,000 or more, go to line 44 to figure tax.
- CAUTION. If you have unearned income and can be claimed as a dependent on your parent's return, check here ► ☐ and see instructions on page 7.

Tax, Payments and Credits

16 Tax, check if from: ☐ Schedule D ☒ Tax Tables 1–12 ☐ Schedule G ☐ Tax Rate Schedule X, Y, or Z ☐ Form 4726 OR ☐ Form 4972 — 16: 7850
17 Total credits (from line 54) 17:
18 Income tax (subtract line 17 from line 16) 18:
19 Other taxes (from line 61) 19:
20 Total (add lines 18 and 19) 20: 7850
21a Total Federal income tax withheld (attach Forms W-2 or W-2P to front) 21a: 1925
b 1973 estimated tax payments (include amount allowed as credit from 1972 return) . . . b:
c Amount paid with Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return: c: 5500
d Other payments (from line 65) . . . . . d:
22 Total (add lines 21a, b, c, and d) 22: 7425

COPY TAXPAYERS

Balance Due or Refund

23 If line 20 is larger than line 22, enter BALANCE DUE IRS — Pay in full with return. Make check or money order payable to Internal Revenue Service ► — 23: 434 *
(Check here ► ☐ . If Form 2210, Form 2210F, or statement is attached. See instructions on page 8.)
24 If line 22 is larger than line 20, enter amount OVERPAID . . . . . ► 24:
25 Amount of line 24 to be REFUNDED TO YOU . . . . . ► 25:
26 Amount of line 24 to be credited on 1974 estimated tax . . . . . ► 26:

Note: 1972 Presidential Election Campaign Fund Designation.—Check ☐ if you did not designate $1 of your taxes on your 1972 return, but now wish to do so. If joint return, check ☐ if spouse did not designate on 1972 return but now wishes to do so.

Sign here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which he has any knowledge.

▶ X Roy D. Garner — Your signature — Date

▶ Preparer's signature (other than taxpayer) — 8/13/74 — Date

▶ X Spouse's signature (if filing jointly, BOTH must sign even if only one had income)

Address (and ZIP Code) — Preparer's Emp. Ident. or Soc. Sec. No.

10—83337-8

Please attach Copy B of Forms W-2 here

Write soc. sec. no. on Check or Money Order. Attach here

F-9

* INCLUDES INTEREST OF 9

Exhibit "A"

F1

BEST COPY AVAILABLE

EXHIBIT B

LETTER OF ROY D. GARNER ATTACHED TO HIS 1973 INDIVIDUAL INCOME TAX RETURN

To: The District Director
Internal Revenue Service
Ogden, Utah

Dear Sir:

This is to be considered as part of my income tax return to the United States for the year 1973.

I am informed and believe that I am under criminal investigation by various agencies of the United States including, but not limited to the Department of Justice and the Federal Bureau of Investigation. I am further informed and believe that I have been named as a member of organized crime by the Attorney General of the United States and/or his authorized agents and that an intergovernmental agency or agencies will review any income tax returns which I file with a view to securing information which could lead to prosecution of me on federal or state criminal charges. I am further informed and believe that any information contained in my income tax returns will be transmitted to appropriate criminal investigative agencies of the states of California and Nevada for such purpose.

Although I would like to file a complete and detailed return, I am truly concerned that any details of my income and expense other than those entered in this return would be

used against me in a criminal proceeding. I therefore respectfully declare that any information for which space is contained on Form 1040, the attached Individual Income Tax Return, for my wife and myself, and which is not filled in, might lead to or uncover information which might tend to, or actually will incriminate me under either state or federal law. *U.S. v. Sullivan,* 274 U.S. 259 (1926); *Marchetti v. U.S.,* 390 U.S. 29 (1968); *Haynes v. U.S.,* 390 U.S. 85 (1968).

I have therefore furnished on the return a figure for taxable income (line 48, page 2) which I believe to be correct and I have computed my tax accordingly. As you will note, this results in a substantial amount of tax, but if you determine through appropriate processes, in accordance with the principles of due process of law, that I am obligated to pay additional tax, I will pay such determination.

†

EXHIBIT C

LETTER OF INTERNAL REVENUE SERVICE WESTERN REGION - DATED NOVEMBER 26, 1974.

In reply refer to: FL-1264 33120; : mdq S
7-492610029

Registered No. 195666

Roy D. & Rowena Garner
501 North Harbin
Carson City, NV 89701

Re: SSN 565-34-2357 D088
DLN 88211-320-00600-4

Tax Year: 1973

Dear Mr. & Mrs. Garner:

We received a Form 1040, U. S. Individual Income Tax Return, for the above year from you, but it is not acceptable as your income tax return. A taxpayer's return, which does not contain any information relating to the taxpayer's income from which the tax can be computed, is not a return within the meaning of the Internal Revenue Code, or the regulations adopted by the Commissioner. The statutory requirements for filing and the criminal penalty for noncompliance are given on the back of this letter.

This letter constitutes notice to you of the legal requirements concerning filing of income tax returns. Noncompli-

ance may subject you to prosecution under Internal Revenue Code Section 7203, which is reproduced on the back of this letter.

Blank Forms 1040 are enclosed for your convenience.

Sincerely yours,

/s/ John O. Hummel

Director

Enclosures:
Forms 1040 (2)

†

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JANUARY 15th, 1975, I served the within SUPPLEMENT AND ADDENDUM TO PETITION FOR WRIT OF CERTIORARI WITH EXHIBITS (Garner v. United States - S. Ct. No. 74-100) on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 [3 copies]

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 [2 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 15th, 1975, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 9, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

INDEX TO APPENDIX

	Page
Index to Clerk's Transcript	1
Notice of Motion and Motions (1) For Severance and Separate Trial; (2) For Copy of Transcript of Grand Jury Proceedings; (3) Affidavit of Alan Saltzman; (4) Points and Authorities; (5) To Compel Government To Disgorge Evidence Favorable to Defendant Re Guilt or Innocence [filed November 26, 1969]	5
Affidavit of Alan Saltzman	6
Memorandum of Points and Authorities	7
Indictment [filed January 22, 1970]	10
Count One	10
Count Two	16
Count Three	16
Count Four	17
Count Five	17
Count Six	18
Count Seven	19
Count Eight	19
Count Nine	20
Count Ten	21
Proposed Corrected Indictment [filed August 4, 1970]	23
Application for Order Compelling Testimony (of Clarence A. "Jack" Swank) - 18 U.S.C. § 2514 [filed October 29, 1970]	25
Affidavit of Robert L. Meyer (United States Attorney)	26
Order as above dated October 29, 1970	27

INDEX TO APPENDIX

	Page
Judgment and Commitment [filed November 16, 1970]	28
Notation re opinion of the Ninth Circuit Court of Appeals (majority and dissenting) and the order denying Petition for Rehearing by that court	29
Excerpts from Reporter's Transcript:	
R.T. p. 59, l. 3 - p. 67, l. 10 (re § 605 and the use of telephone toll records)	30
R.T. p. 248, l. 24 - p. 264, l. 16 (re Daily Racing Form and its status as a business record pursuant to § 1732(a))	36
R.T. p. 420, l. 18 p p. 423, l. 4 (re testimony of Clarence A. "Jack" Swank)	49
R.T. p. 1201, l. 8 - p. 1209, l. 18 (re introduction of income tax returns)	51
R.T. p. 1365, l. 9 - p. 1366, l. 12 (use of Mr. Garner's income tax returns on argument to the jury)	58
Exhibit 19 - Income Tax Returns	60
for 1965	72
for 1966	69
for 1967	61

INDEX OF CLERK'S TRANSCRIPT

In the United States District Court, Central District of California.

UNITED STATES OF AMERICA, Plaintiff, vs. ROY D. GARNER, Defendant.

Case No. 5356 (F) Criminal.

	Page
Application for Order Compelling Testimony, filed 10/29/70	237
Certified Copy of Indictment, filed 1/22/70	40
Certified Copy of Judgment and Commitment, filed 11/16/70	275
Certified Copy of Motion to Dismiss Indictment (Case No. 4790-Crim.), filed 11/26/69	2
Certified Copy of Notice of Motion and Motion for Bill of Particulars (Case No. 2790-Crim.), filed 11/26/69	6
Certified Copy of Notice of Motion and Motion for Discovery (Case No. 4790-Crim.), filed 11/26/69	15
Certified Copy of Notice of Motion and Motions for Severance and for Separate Trial; for Copy of Transcript of Grand Jury Proceedings; Affidavit; Points and Authorities; to Compel Government to Disgorge Evidence Favorable to Defendant re Guilt or Innocence (Case No. 4790-Crim.), filed 11/26/69	32
Certified Copy of Notice of Motion and Motions for New Trial/Judgment of Acquittal/ An Arrest of Judgment; Points and Authorities in Support Thereof (Case No. 4790), filed 5/18/70	83

Certified Copy of Statement of Docket Entries 280

Defendant's Proposed Instructions (1 through 7), filed 11/5/70 247

Defendant's Proposed Jury Instructions filed 3/10/70 74

Defendant's Requested Instruction No. 6, filed 3/11/70 79

Defendant's Trial Memorandum Re Admissibility of Telephone Company Records, filed 10/15/70 190

Designation and Appearance Counsel, filed 4/20/70 82

Designation of Record on Appeal, filed 11/23/70 277

Exhibit to Points and Authorities in Support of Motion for New Trial, filed 5/28/70 125

Exhibit to Supplementary Memorandum of Points and Authorities in Opposition to Motion for New Trial, filed 6/12/70 170

... Instructions - filed 11/5/70 254

Government's Requested Special Instructions, filed 10/28/70 209

Memorandum of Law, filed 2/17/70 60

Minute Order (Case No. 4790-Crim.), dated 10/27/69 1

Minute Order (Case No. 4790-Crim.), dated 12/18/69 39

Minute Order, dated 5/28/70 128

Minute Order, dated 6/12/70 172

Minute Order, dated 6/22/70 173

Minute Order, dated 8/5/70 187

Minute Order, dated 8/17/70 188

Minute Order, dated 10/5/70 189

Minute Order, dated 10/27/70 207

Minute Order, dated 10/28/70 208

Minute Order, dated 10/29/70 236

Minute Order, dated 11/2/70 243

Minute Order, dated 11/3/70 244

Minute Order, dated 11/4/70 245

Minute Order, dated 11/5/70 246

Minute Order, dated 11/6/70 265

Minute Order, dated 11/16/70 274

Motion for Bail for Witness, filed 7/24/70 174

Notice of Appeal, filed 11/16/70 276

Notice of Motion and Motion to Quash Subpoenas, filed 5/26/70 116

Opposition to Defendant's Motions for New Trial, Judgment of Acquittal, and Arrest of Judgment, filed 5/22/70 109

Index of Clerk's Transcript

Opposition to Defendant's Motion to Suppress Evidence, etc., filed 10/21/70 199

Points and Authorities in Support of Defendant's Objections to Introduction of Defendant's Past Income Tax Returns, filed 2/17/70 67

Points and Authorities in Support of Motion for New Trial and Judgment of Acquittal, filed 11/12/70 267

Proposed Corrected Indictment, filed 8/4/70 178

Requested Voir Dire Questions and Motion (contained in question No. 29), filed 2/3/70 55

Second Supplementary Exhibits and Points and Authorities in Support of Motion for New Trial, filed 6/10/70 163

Supplementary Memorandum of Points and Authorities in Opposition to Motion for New Trial, filed 6/9/70 147

Supplementary Memorandum of Points and Authorities in Support of Motion for New Trial, etc., filed 6/4/70 129

Verdict filed 3/17/70 81

Verdict filed 11/6/70 266

Original and 2 copies of Reporter's Transcript of Proceedings had on October 27, 28, 29, 1970 (volumes 1, 2 and 3); November 2, 3, 4, 5, (volumes 4, 5, 6 and 7); November 6 and 16, 1970 (volume 8)

Certificate By The Clerk

I, Emory G. Hatcher, Clerk of the above entitled Court, hereby certify the documents listed herein, together with the other listed items, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above entitled case.

Dated and Signed: February 9, 1971.

NOTICE OF MOTION AND MOTIONS (1) FOR SEVERANCE AND SEPARATE TRIAL; (2) FOR COPY OF TRANSCRIPT OF GRAND JURY PROCEEDINGS; (3) AFFIDAVIT OF ALAN SALTZMAN; (4) POINTS AND AUTHORITIES; (5) TO COMPEL GOVERNMENT TO DISGORGE EVIDENCE FAVORABLE TO DEFENDANT RE GUILT OR INNOCENCE

In the United States District Court, Central District of California.

UNITED STATES OF AMERICA, Plaintiffs, vs. CLARENCE A. SWANK; ROY D. GARNER, et al., Defendants.

Criminal No. 4790(F).

[FILED NOVEMBER 26, 1969]

TO THE UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on December 18, 1969, at 10:00 o'clock A.M., as previously orally noticed in Court, before the HONORABLE WARREN J. FERGUSON, the Defendant, ROY D. GARNER, will, through counsel, move the Court for orders as follows:

(1) Directing a severance and separate trial as to the Defendant, ROY D. GARNER, from the other Defendants;

(2) Directing the United States Attorney to have transcribed all grand jury proceedings leading up to the instant indictment and to provide a copy thereof to counsel for the Defendant, ROY D. GARNER;

(3) Directing the U. S. Attorney to disclose to counsel for ROY D. GARNER all evidence known to him favorable to the Defendant on the issue of his guilt or innocence.

The within motions are based on the within affidavit

attached hereto, the Points and Authorities attached hereto, the records and files in the above-entitled cause, and any and all other matters which may be presented prior to or at the time of the hearing of said motions.

Respectfully submitted,

Alan Saltzman

Attorney for Defendant

Affidavit of Alan Saltzman

State of California)
) ss.
County of Los Angeles)

ALAN SALTZMAN states under oath the following:

1. That he is an attorney retained to represent the Defendant, ROY D. GARNER, in the within action:

RE: SEVERANCE MOTION.

Your affiant is informed and believes and thereon alleges that the Defendant, ROY D. GARNER, would be placed in a dilemma so far as presenting his case to the jury is concerned if he were tried with any of the other co-Defendants because of the statements and conduct of the said co-Defendants, and because of the fact that it might become encumbant upon counsel for any co-Defendant to argue his client's innocence based on the guilt of ROY D. GARNER, which would operate to the obvious prejudice of ROY D. GARNER, and that, therefore, fairness demands that the moving party, ROY D. GARNER, be tried

separately.

Your affiant is further informed and believes and thereon alleges that there are acts, declarations and conduct which the Government proposes to offer during the course of the trial which would be admissible only against one of the co-Defendants, and that it would be impossible for the jury to consider said evidence only against the declarant or actor.

Your affiant further believes that certain co-Defendants have made certain admissions or statements to witnesses which would be hearsay as to the Defendant, ROY D. GARNER, but that the jury would not be able to exclude such admissions by one co-Defendant when considering the guilt or innocence of the Defendant, ROY D. GARNER.

Your affiant has been informed by the U. S. Attorney that there are certain statements which have been made by one or more of the Defendants which implicate Defendant, ROY D. GARNER . . .

[At the time of the preparation of this appendix, the subsequent page of the Affidavit of Alan Saltzman was found to be missing from the copy of the Clerk's Transcript furnished counsel. At time of printing, this page had still not been obtained. The record will be supplemented with this information.]

Memorandum of Points and Authorities

Severance:

Rule 14 of the Federal Rules of Criminal Procedures provides for separate trials if the Defendant would be prejudiced by the joinder of Defendants.

Transcript of Grand Jury Testimony:

In *United States vs. Youngblood*, 379 Fed. 2d 365 (1967), the Second Circuit Court of Appeals establishes the rule that upon the request of defense counsel, the court shall order that he be allowed to examine the grand jury testimony of any witnesses who testifies at the trial. The Court notes that an order will not be made if the Government can establish that disclosure would jeopardize national security or other significant interest. The Court expressly establishes that defense counsel is not required to show a "particularized need" for the Grand Jury Transcript. The "particularized need" standard authorized in *Dennis vs. United States*, 384 U.S. 855, 86 Supreme Court 1840, 16 L. Ed. 2d 973 (1966) is held to be not mandatory and is discarded because of the burden placed on the trial judges in applying it. Said burden consists of an *in camera* search for inconsistencies. The Court further declared that an alternative ground for allowing discovery of the Grand Jury Transcript is the language of Rule 6 of the Federal Rules of Criminal Procedures which gives to trial courts discretion to authorize disclosure of the transcript of Grand Jury Proceedings.

In *Brown vs. United States*, 359 U.S. 41, 48, 3 L. Ed. 2d 609, 616, 79 S. Ct. 539, the Court states:

> "A grand jury is clothed with great independence in many areas, but it remains an appendage of the Court, powerless to perform its investigative function

> without the Court's aid, because powerless itself to compel the testimony of witnesses. It is the Court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify, if after appearing he refuses to do so."

Re: Disclosure of Evidence Favorable Re: Guilt:

In *Brady vs. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (decided May 13, 1963), the Supreme Court stated as follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates Due Process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Respectfully submitted,

/s/ Alan Saltzman

Attorney for Defendant

[18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 1084: Interstate Transmission of Wagering Information; 18 U.S.C. § 1952; Interstate Transportation in Aid of Racketeering; 18 U.S.C. § 2: Aiding and Abetting.]

In the United States District Court, Central District of California, December, 1968 Grand Jury.

UNITED STATES OF AMERICA, Plaintiff, v. CLARENCE A. SWANK (aka JACK SWANK); LYLE K. BERGE; BERNARD I. BERNSTEIN; NICHOLAS P. DE SISTO, JR.; WAYNE DONAWAY (aka BABE DONAWAY); ROY D. GARNER; HAROLD W. GOLDBAUM; EMERY L. LONG; GEORGE SCOVILLE; Defendants.

No. 5356 Crim.

[FILED JANUARY 22, 1970]

The Grand Jury Charges:

COUNT ONE

[18 U.S.C. § 371]

Commencing prior to January 1, 1968, and continuing to the date of the return of this indictment, defendants CLARENCE A. SWANK (also known as JACK SWANK), LYLE K. BERGE, BERNARD I. BERNSTEIN, NICHOLAS P. DE SISTO, JR., WAYNE DONAWAY, (also known as BABE DONAWAY), ROY D. GARNER, HAROLD W. GOLDBAUM, EMERY L. LONG, GEORGE SCOVILLE, and their unindicted co-conspirators William O. Lawler, (also known as Bankroll Bill), Lois J. Rusch, Lynn Marmor (also known as Lennie Moore), and Kenneth M. Brandyberry (also known as Kenneth Miller), agreed, confederated and conspired together to commit offenses against the United States as follows:

(a) To engage in the business of betting and wagering

and to use wire communication facilities for the transmission in interstate commerce of bets and wagers and information assisting in the placing of bets and wagers, in violation of Title 18, United States Code, Section 1084;

(b) To travel in interstate commerce and use facilities in interstate commerce with intent to (1) distribute the proceeds of unlawful activity, namely: a business enterprise involving gambling and bribery offenses in violation of the laws of California, Ohio, Pennsylvania, Texas, and of the United States; and (2) promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity; and thereafter to perform and attempt to perform acts specified in (1) and (2) above, in violation of Title 18, United States Code, Section 1952;

(c) To carry into effect, and attempt to carry into effect a scheme in commerce to influence by bribery sporting contests, namely: horse races, with knowledge that the purpose of such scheme was to influence said contests by bribery, in violation of Title 18, United States Code, Section 224.

The object of the conspiracy was as follows: defendants and their unindicted co-conspirators would arrange to fix horse races, by means of bribery, injecting stimulants in horses, and other means, and would secure information regarding particular horses and jockeys from sources unavailable to the general public. Based upon these arrangements and this information, defendants would attempt to place and place wagers on particular horses. In order to maintain high pari-mutuel odds, and in order to avoid others not party to the conspiracy placing wagers on the

same horses, wagers were placed with bookmakers, away from the track, shortly before starting time of the race in which the particular horse was running. Defendants and their unindicted co-conspirators would travel in interstate commerce and use facilities in interstate commerce for the purpose of arranging for wagers to be placed, and to place and attempt to place wagers. Defendants and their unindicted co-conspirators would use wire communication facilities to transmit in interstate commerce wagers and information assisting in the placing of wagers.

To effect the objects of the conspiracy, defendants and their unindicted co-conspirators committed divers overt acts in the Central District of California, including the following:

1. On or about May 23, 1968, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), and defendant CLARENCE A. SWANK, (also known as JACK SWANK), attempted to place and placed wagers on the horse "Mister Fourway", entered in the seventh race at Golden Gate Fields, Albany, California, on May 23, 1968.

2. On or about September 25, 1968, defendant EMERY L. LONG telephoned defendant ROY D. GARNER in Upland, California.

3. On or about September 25, 1968, defendant CLARENCE A. SWANK, (also known as JACK SWANK), telephoned defendant ROY D. GARNER in Upland, CAlifornia.

4. On or about September 25, 1968, defendant EMERY L. LONG caused the injection of amphetamine, a stimulant drug, into the horse "Deerwood Duke," entered in the twelfth race at Pomona Fairgrounds, Pomona,

California, on September 25, 1968.

5. On or about September 25, 1968, defendant CLARENCE A. SWANK, (also known as JACK SWANK), telephoned unindicted co-conspirator Lynn Marmor, (also known as Lennie Moore), in Houston, Texas.

6. On or about September 25, 1968, defendant CLARENCE A. SWANK, (also known as JACK SWANK), telephoned defendant BERNARD I. BERNSTEIN in Beverly Hills, California.

7. On or about September 25, 1968, defendant BERNARD I. BERNSTEIN telephoned defendant HAROLD W. GOLDBAUM in Las Vegas, Nevada.

8. On or about September 25, 1968, defendant CLARENCE A. SWANK, (also known as JACK SWANK), telephoned defendant LYLE K. BERGE in Buena Park, California.

9. On or about September 25, 1968, defendant LYLE K. BERGE telephoned unindicted co-conspirator Kenneth M. Brandyberry, (also known as Kenneth Miller), in Downey, California.

10. On or about September 25, 1968, unindicted co-conspirators William O. Lawler (also known as Bankroll Bill), Lynn Marmor, (also known as Lennie Moore), Kenneth M. Brandyberry, (also known as Kenneth Miller), and defendants CLARENCE A. SWANK, (also known as JACK SWANK), LYLE BERGE, BERNARD I. BERNSTEIN and HAROLD W. GOLDBAUM attempted to place and placed wagers on the horse "Deerwood Duke," entered in the twelfth race at Pomona Fairgrounds, Pomona, California, on September 25, 1968.

11. On or about September 27, 1968, defendant

EMERY L. LONG, in Las Vegas, Nevada, telephoned defendant ROY D. GARNER, in Upland, California.

12. On or about November 28, 1968, defendant ROY D. GARNER telephoned defendant CLARENCE A. SWANK, (also known as JACK SWANK), in Los Alamitos, California.

13. On or about November 28, 1968, defendant CLARENCE A. SWANK, (also known as JACK SWANK), telephoned unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), in Gardena, California.

14. On or about November 28, 1968, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), and defendant CLARENCE A. SWANK, (also known as JACK SWANK), attempted to place and placed wagers on the horse "Maretazo II," entered in the ninth race at Bay Meadows Racetrack, San Mateo, California on November 28, 1968.

15. On or about December 3, 1968, defendant ROY D. GARNER telephoned defendant CLARENCE A. SWANK, (also known as JACK SWANK), in Los Alamitos, California.

16. On or about December 3, 1968, defendant CLARENCE A. SWANK, (also known as JACK SWANK) telephoned unindicted co-conspirator William Lawler, (also known as Bankroll Bill), in Gardena, Calfornia.

17. On or about December 4, 1968, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), and defendant CLARENCE A. SWANK, (also known as JACK SWANK), attempted to place and placed wagers on the horse "King Kildare," entered in the fifth race at Bay Meadows Racetrack, San Mateo, California, on December 4, 1968.

18. On or about April 18, 1969, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill),

telephoned defendant WAYNE DONAWAY, (also known as BABE DONAWAY), in Philadelphia, Pennsylvania.

19. On or about April 18, 1969, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), mailed money orders and cashier's checks totaling $4,200.00 to defendant WAYNE DONAWAY, (also known as BABE DONAWAY), in Philadelphia, Pennsylvania.

20. On or about April 10, 1969, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), gave cash totaling $4,000.00 to defendant NICHOLAS P. DE SISTO, JR.

21. On or about April 10, 1969, defendant NICHOLAS P. DE SISTO, JR. traveled to Cleveland, Ohio.

22. On or about April 10, 1969, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill) telephoned defendant GEORGE SCOVILLE in San Jose, California.

23. On or about April 10, 1969, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), mailed money orders and cashier's checks totaling $1,000 to defendant GEORGE SCOVILLE in San Jose, California.

24. On or about April 18, 1969, defendant GEORGE SCOVILLE traveled to Reno, Nevada.

25. On or about April 18, 1969, unindicted co-conspirator William O. Lawler, (also known as Bankroll Bill), and defendants CLARENCE A. SWANK, (also known as JACK SWANK), WAYNE DONAWAY, (also known as BABE DONAWAY), NICHOLAS P. DE SISTO, JR., and GEORGE SCOVILLE attempted to place and placed wagers on the horse "Prize Candy," entered in the second race at Gulfstream Park, Hallandale, Florida, on April 18, 1969.

COUNT TWO

[18 U.S.C. §§ 1084, 2]

On or about September 25, 1968, at 5:38 p.m., defendant CLARENCE A. SWANK, (also known as JACK SWANK), being engaged in the business of betting and wagering, knowingly used a wire communication facility, namely: a telephone, for the transmission in interstate commerce from Gardena, California, within the Central District of California, to Houston, Texas, of bets and wagers and information assisting in the placing of bets and wagers on sporting events and contests.

At said time and place, defendant ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

COUNT THREE

[18 U.S.C. §§ 1952, 2]

On or about September 25, 1968, defendant CLARENCE A. SWANK, (also known as JACK SWANK), and Lynn Marmor, (also known as Lennie Moore), used the telephone, a facility in interstate commerce between Gardena, California, within the Central District of California, and Houston, Texas, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving gambling and bribery offenses in violation of California Penal Code, Sections 337a, 337b, and 337f; Texas Penal Code, Articles 648 and 652a; and Title 18, United States Code, Sections 224 and 1084; and thereafter defendant CLARENCE A. SWANK, (also known as JACK SWANK), and Lynn Marmor, (also known as Lennie Moore), performed and attempted to perform acts to promote, manage, establish, carry on, and

facilitate the promotion, management, establishment and carrying on of said unlawful activity, including the following: CLARENCE A. SWANK, (also known as JACK SWANK), and Lynn Marmor, (also known as Lennie Moore), attempted to place and placed wagers on the horse "Deerwood Duke," entered in the twelfth race at Pomona Fairgrounds, Pomona, California, on September 25, 1968.

At said time and place, defendant ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

COUNT FOUR

[18 U.S.C. §§ 1084; 2]

On or about September 25, 1968, at 5:39 p.m., defendants BERNARD I. BERNSTEIN and HAROLD W. GOLDBAUM, being engaged in the business of betting and wagering, knowingly used a wire communication facility, namely: a telephone, for the transmission in interstate commerce from Beverly Hills, California, within the Central District of California, to Las Vegas, Nevada, of bets and wagers and information assisting in the placing of bets and wagers on sporting events and contests.

At said time and place, defendants CLARENCE A. SWANK, (also known as JACK SWANK), and ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

COUNT FIVE

[18 U.S.C. §§ 1952; 2]

On or about September 25, 1968, defendants BERNARD I. BERNSTEIN and HAROLD W. GOLDBAUM used

the telephone, a facility in interstate commerce, between Beverly Hills, California, within the Central District of California, and Las Vegas, Nevada, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving gambling and bribery offenses in violation of California Penal Code, Sections 337a, 337b, and 337f; and Title 18, United States Code, Sections 224 and 1084; and thereafter defendants BERNARD I. BERNSTEIN and HAROLD W. GOLDBAUM performed and attempted to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity including the following: defendants BERNARD I. BERNSTEIN and HAROLD W. GOLDBAUM attempted to place and placed wagers on the horse "Deerwood Duke," entered in the twelfth race at Pomona Fairgrounds, Pomona, California, on September 25, 1968.

At said time and place, defendants CLARENCE A. SWANK, (also known as JACK SWANK), and ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

COUNT SIX

[18 U.S.C. § 1952]

On or about September 27, 1968, defendants EMERY L. LONG and ROY D. GARNER used the telephone, a facility in interstate commerce, between Las Vegas, Nevada, and Upland, California, within the Central District of California, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and

carrying on of an unlawful activity, namely: a business enterprise involving gambling and bribery offenses in violation of California Penal Code, Sections 337a, 337b and 337f; and Title 18, United States Code, Sections 224 and 1084; and thereafter defendants EMERY L. LONG and ROY D. GARNER distributed the proceeds of said unlawful activity.

COUNT SEVEN

[18 U.S.C. §§ 1084; 2]

On or about April 18, 1969, William O. Lawler, (also known as "Bankroll Bill"), and defendant WAYNE DONAWAY, (also known as BABE DONAWAY), being engaged in the business of betting and wagering, knowingly used a wire communication facility, to wit: a telephone, for the transmission in interstate commerce from Gardena, California, within the Central District of California, to Philadelphia, Pennsylvania, of bets and wagers and information assisting in the placing of bets and wagers on sporting events and contests.

At said time and place, defendants CLARENCE A. SWANK, (also known as JACK SWANK), and ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

COUNT EIGHT

[18 U.S.C. §§ 1952; 2]

On or about April 18, 1969, William O. Lawler, (also known as Bankroll Bill), and defendant WAYNE DONAWAY, (also known as BABE DONAWAY), used the mail, a facility in interstate commerce, between Gardena, California, within the Central District of California, and Philadelphia, Pennsyl-

vania, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving gambling offenses in violation of California Penal Code, Section 337a; Title 18, Pennsylvania Statutes, Section 4607; and Title 18, United States Code, Section 1084; and thereafter William O. Lawler, (also known as Bankroll Bill), and defendant WAYNE DONAWAY, (also known as BABE DONAWAY), performed and attempted to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, including the following: William O. Lawler, (also known as Bankroll Bill), and defendant WAYNE DONAWAY, (also known as BABE DONAWAY), attempted to place and placed wagers on the horse "Prize Candy," entered in the second race at Gulfstream Park, Hallandale, Florida, on April 18, 1969.

At said time and place, defendants CLARENCE A. SWANK, (also known as JACK SWANK), and ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

COUNT NINE

[18 U.S.C. §§ 1952; 2]

On or about April 10, 1969, defendant NICHOLAS P. DE SISTO JR., traveled in interstate commerce from Los Angeles County, in the Central District of California, to Cleveland, Ohio, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely; a business enterprise involving gambling offenses in violation

of California Penal Code, Section 337a; Ohio Revised Code, Section 2915.05; and Title 18, United States Code, Section 1084; and thereafter defendant NICHOLAS P. DE SISTO, JR. performed and attempted to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, including the following: defendant NICHOLAS P. DE SISTO, JR. attempted to place and placed wagers on the horse "Prize Candy," entered in the second race at Gulfstream Park, Hallandale, Florida, on April 18, 1969.

At said time and place, defendants CLARENCE A. SWANK, (also known as JACK SWANK), and ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

COUNT TEN

[18 U.S.C. §§ 1952; 2]

On or about April 18, 1969, defendant GEORGE SCOVILLE travelled in interstate commerce from San Jose, California, to Reno, Nevada, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise in Los Angeles County in the Central District of California, involving gambling offenses in violation of California Penal Code, Section 337a; and Title 18, United States Code, Section 1084; and thereafter defendant GEORGE SCOVILLE performed and attempted to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, including the following: defendant GEORGE SCOVILLE attempted to place and placed wagers

on the horse "Prize Candy," entered in the second race at Gulfstream Park, Hallandale, Florida, on April 18, 1969.

At said time and place, defendants CLARENCE A. SWANK, (also known as JACK SWANK), and ROY D. GARNER aided, abetted, counselled, induced and procured the commission of the offense alleged above.

A TRUE BILL

INA MORRIS

FOREMAN

WM. MATTHEW BYRNE, JR.
United States Attorney

In the United States District Court, Central District of California.

UNITED STATES OF AMERICA, Plaintiff, v. ROY D. GARNER, Defendant.

No. 5356-(WF)-Crim.

[FILED AUGUST 4, 1970]

Plaintiff, United States of America, herewith submits a proposed corrected indictment for the re-trial of the above defendant. The "corrections" consist of the striking of all allegations which have been rendered surplusage by prior proceedings and rulings of the Court, including the following:

(1) References to other defendants and other offenses no longer on trial have been removed from the heading;

(2) The names of defendants Berge, Bernstein, De Sisto, Donaway, Goldbaum, Long and Scoville have been removed from the list of conspirators at lines 26 - 29 of page 1;

(3) All references to William O. Lawler as "(also known as Bankroll Bill)" have been removed.

(4) The overt acts alleged to have been performed by persons other than those still named as co-conspirators have been removed, including overt acts numbered 2, 4, 7, 9, 11, 18, 19, 21 and 24;

(5) Count Three through Ten have been eliminated.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

DAVID R. NISSEN
Assistant United States Attorney
Chief, Criminal Division

/s/ GERALD F. UELMEN
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

[Accompanying the aforesaid was an affidavit of service showing service August 4, 1970 on Burton Marks and a corrected Indictment reflecting the changes proposed and indicating charges under 18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 1084: Interstate Transmission of Wagering Information; 18 U.S.C. § 2: Aiding and Abetting.]

APPLICATION FOR ORDER COMPELLING TESTIMONY
18 U.S.C. § 2514

In the United States District Court, Central District of California.

UNITED STATES OF AMERICA, Plaintiff, v. ROY D. GARNER, Defendant.

No. 5356-(WF)-CD.

[FILED OCTOBER 29, 1970]

The United States of America hereby moves the Court for an Order instructing CLARENCE A. "JACK" SWANK to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Section 2514, and respectfully represents as follows:

1. CLARENCE A. "JACK" SWANK is appearing as a witness in the above-captioned case, a trial on an indictment charging violations of 18 U.S.C. § 1084 and conspiracy to violate 18 U.S.C. §§ 224, 1084 and 1952.

2. This application is made in good faith, with the approval of the Attorney General of the United States, by the United States Attorney, in whose judgment the testimony of CLARENCE A. "JACK" SWANK is necessary to the public interest.

WHEREFORE, the United States of America requests the Court to order CLARENCE A. "JACK" SWANK to answer questions and produce evidence relating to all matters pertinent to the pending trial, pursuant to the provisions of Title 18, United States Code, Section 2514.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

DAVID R. NISSEN
Assistant U. S. Attorney
Chief, Criminal Division

/s/ GERALD F. UELMEN
Special Assistant U. S. Attorney

Attorneys for Plaintiff
United States of America

Affidavit of Robert L. Meyer

State of California)
) ss.
County of Los Angeles)

ROBERT L. MEYER, being first sworn, deposes and says:

1. I am United States Attorney for the Central District of California.

2. This application is made in good faith with the approval of the Attorney General of the United States.

3. In my judgment the testimony of CLARENCE A. "JACK" SWANK sought is necessary to the public interest and material to the case of *United States v. Roy D. Garner*, No. 5356-(WF)-CD, presently in trial.

/s/ ROBERT L. MEYER

Notarized by Kathryn A. Clark
on the 28th day of October, 1970.

In the United States District Court, Central District of California.

UNITED STATES OF AMERICA, Plaintiff, v. ROY D. GARNER, Defendant.

No. 5356-(WF)-CD.

[OCTOBER 29, 1970]

The United States of America, having made written and oral application for an Order compelling CLARENCE A. "JACK" SWANK to testify and produce evidence in the trial of the above case, pursuant to Title 18, United States Code, Section 2514; and

CLARENCE A. "JACK" SWANK, having declined to answer questions by claiming his privilege against self-incrimination; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest, it is

ORDERED that CLARENCE A. "JACK" SWANK appear forthwith and testify and produce evidence with respect to all matters under inquiry in said trial.

DATED: This 29 day of October, 1970.

/s/ WARREN A. FERGUSON
United States District Judge

In the United States District Court, for the Central District of California.

UNITED STATES OF AMERICA v. ROY D. GARNER.

No. 5356-Criminal.

[FILED NOVEMBER 16, 1970]

On this 16th day of November, 1970, came the attorney for the government and the defendant appeared in person and by counsel, Burton Marks, Retained.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty, and a verdict of Guilty, has been convicted of the offense of Conspiracy, in violation of Title 18, United States Code, Section 371, as charged in count one of the Indictment in ten counts filed the 22nd day of January, 1970, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years on count one.

IT IS ADJUDGED that the defendant shall become eligible for parole at such time as the United States Board of Parole shall determine as provided in Title 18, United States Code, Section 4208 (a) (2).

IT IS ADJUDGED that the execution of sentence herein is stayed until November 30, 1970 at 2:00 p.m., the defendant's bond exonerated upon his surrender or upon posting an appeal bond in the amount of $10,000.00 personal surety.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WARREN J. FERGUSON
United States District Judge

by: /s/ K. J. Murphy, Jr.,
Deputy Clerk

NOTATION RE NINTH CIRCUIT

The majority and dissenting opinions of the Ninth Circuit Court of Appeals appear in the Appendix for the Petition for Writ of Certiorari as Exhibit "A."

The Order denying the Petition for Rehearing appears as Exhibit "B" to said petition.

[Page 59, line 3 - page 67, line 10]

I understand you have some motions on matters outside the presence of the jury, Mr. Marks.

MR. MARKS; Yes, your Honor. I will try to be brief.

The Court received the opposition that I have to the introduction of certain telephone calls, and the Government's opposition.

I would like to be heard in two respects. Number one: I would like to orally argue in support of my position;

And secondly, I would like to suggest to the Court that I think we are going to be able to arrive at a stipulation - - well, let me give you my argument and then my suggestions.

As I see the thrust of Mr. Uelmen's opposition to my motion, which he deems a motion to suppress, and which I suggest may be an objection to the introduction of the evidence because it is not at all clear that a violation of Rule 605 would come within the purview of Rule 41 - - Section 605 would come within the purview of Rule 41 as a suppression motion.

Assuming that it does, or assuming that an objection to the introduction of the evidence is [60] appropriate, I suggest that it is obvious, not only from the Government's argument and the intended use that these communications with various telephone records are going to be put together, that they are expressly intended to divulge communications.

If my recollection is clear, Mr. Uelmen's argument - - I think it was around the time of the motions for judgment of acquittal where he stated something to the effect that the various communication lines on the chart, in fact spoke

louder than words, they didn't have to have the communications in there, that they expressed the words that were stated between Party A and Party B on those telephone toll records because the pattern itself divulged what the communication was about, taken in consideration with all the other evidence.

Therefore it is the express intention of the Government to use the telephone toll records as a communication, which I think is prohibited.

Now, the basis for 605 - - and I think the fact that the use of the telephone in and of itself - - is that you are supposed to have the right to privacy, a telephone I think, today being within the purview of - - it is Government controlled, it is a monopoly, it is a public utility, it bears the same status as the mails.

A person has the right to assume that his [61] telephone calls to wherever made will not be divulged except upon his consent and permission. And he has that same right to privacy in his own toll records as in fact the disclosure of his information.

The fact that they were obtained here by subpoena I think would be irrelevant unless the subpoena was backed up by an affidavit in support of the subpoena, which would be sufficient to establish probable cause for the existence of a crime, in order to have the Government be able, either by subpoena or otherwise, to take somebody's private property and utilize it.

So that essentially is my argument in opposition to the Government's opposition. I think that we are dealing with an unlawful use of telephone records.

Now, it is my opinion that if there is a prima facie illegality established, the possibility of a prima facie

illegality by the Government, then the burden is on the Government - - not on the defendant - - to show that the records which they have were lawfully obtained.

Now, as I understand the procedure, and I don't know whether Mr. Uelmen is willing to stipulate to this precisely in this form, all of the telephone records were in fact originally obtained through the use of grand jury subpoena, and were not obtained otherwise.

However, the – as I understand it there was an [62] extended investigation with the grand jury meeting practically every week and the Government presenting evidence with respect to this investigation for almost a year before the indictments issued.

Now, during the course of the investigation - - I use the words in quotes - - the Government secured the evidence of the toll records through grand jury subpoenas. They did not – - I would be willing to venture a guess - - produce the records at the time of the grand jury hearings for the grand jury to hear the evidence, but rather they gathered the evidence into their own investigatory staff through the use of subpoenas and then drew the charts which they later presented here to the Court, and I believe probably to the grand jury, at least a synopsis of what was contained in the records.

Now, in my opinion this would be an abuse of the grand jury subpoena process in two respects:

Number one, I would suspect - - and I think that it is the *Weeks* case that is the original case that dealt with subpoenas as being searches and seizures - - in any case I doubt whether the affidavits in support of the subpoenas were sufficient under any theory. And even if they were sufficient that the use of them was contrary to the intention of the statute

as to the manner in which they could be used.

In other words, they could only be used to [63] present to a Court or a grand jury, which is an arm of the Court, but not used as a method of obtaining investigatory leads by the Government, unless there has in fact been a compliance with the general rules of search and seizure to obtain the records.

So I wanted to suggest to the Court that we may be able to arrive at a stipulation as to how the records were obtained and how they were used.

I would like to have a ruling from the Court as to whether or not, assuming we can't arrive at a stipulation, as to whether or not the Government has the burden, or the defense has the burden of showing that there was an unlawfully obtained telephone record in violation of Section 605, and that therefore all of the proceedings flowing from that are tainted, and as such there has been no attenuation of the taint, and it would not be admissible in evidence.

What I am asking is that the Court first establish whether or not we have - - first make a ruling as to whether or not they can use the toll records obtained, I believe in violation of 605.

Secondly, if there isn't that direct violation as to whether or not the Government has the burden of showing that they were produced lawfully, if the defense has such a burden, can we have, during the course of the trial or sometime before the trial, a definitive ruling by the Court [64] as to whether or not these toll records can be used.

I also have the final argument, and that is that under the authority of the case called *State versus Timms,* 9, Ohio 2nd, which is a Supreme Court of Ohio, I think I cited it to the Court once before, the Ohio Supreme Court held that the

busines records exceptions to the hearsay rule is a denial of confrontation of witnesses.

And the Government is, in this instance, trying to establish that business records of the telephone company are somehow admissible to prove the truth of a particular conversation, or the existence of some type of communication.

And if they are taking that position, which I believe they are, then the records themselves are an attempt to establish a fact which is hearsay, and as I say, we have no way to examine the person who actually made the records, or the machine, and therefore they would not be admissible under that alternative theory.

I think that -- I don't know whether I have made myself clear, your Honor.

THE COURT: Just don't repeat it.

MR. MARKS: I won't.

THE COURT: Mr. Uelmen?

MR. UELMEN: Your Honor, with respect to the first point of who bears the burden of proof, I believe the law is quite clear, I think the moving party on a motion to [65] suppress does bear the burden of initially showing the illegality in the acquisition of the evidence.

And a recent case dealt precisely with that point in a motion where a similar argument was being made with respect to telephone toll records is the Tenth Circuit *Nolan* case, which we have cited in our memorandum, and which holds directly that the burden is on the moving party.

However, we have offered to stipulate with Mr. Marks that the method by which these particular records were acquired, telephone toll records were acquired was by

means of a subpoena to produce the records before the grand jury, at which time the records were produced.

Our basic position is that, first of all, Section 605 has no application whatsoever to telephone toll records because they are simply not communications that Section 605 was designed to protect.

That is the approach taken by the Second Circuit case of *Covella* which holds in essence that Section 605, interpreted in a common sense manner, has nothing to do with toll records kept in the ordinary course of business, because this is not the interception of a communication.

And if it is not a communication at the time it was intercepted, and the record is kept by the telephone company, it does not then, and is not going to become a communication because of the use to which the record was put [66] by the Government.

There is simply no general right to privacy as to records that are kept in the ordinary course of any business, bank records or anything else are subject to the subpoena powers of the court.

We would also alternatively argue that even if we were to say that Section 605 does apply to telephone toll records, that the means of acquisition of these records come within the exception recognized in Section 605 whereby those engaged in receiving and transmitting records or communications can divulge them pursuant to a lawful subpoena.

And finally with respect to the *Ohio versus Timms* case, your Honor, of course that has no application to the Federal Business Records Act which still recognizes the hearsay exception in Federal Courts for records kept in the ordinary course of business.

There were at least three cases from three different circuits that have come down within the past year, all of which have rejected all of the arguments that are being made by counsel today.

THE COURT: All right.

MR. MARKS: Submitted.

THE COURT: I think the Government's position is the correct one, Mr. Marks.

I feel that as a result of the memoranda which [67] have been furnished the Court by both sides and the result of the arguments, that the law is that business toll records from the telephone companies are not within the prohibition contained in 605. And further that, even if it were, the subpoena powers of this Court would exempt the prohibition from 605.

Insofar as the Federal Government rule on the admissibility of the business records violates the confrontation clause of the Bill of Rights, the cases are legion on that.

The motion will be denied.

[Page 248, line 24 - page 264, line 16]

BY MR. UELMEN:

Q Now Mr. Foote, during the - - does the Horse [249] Racing Board also maintain any records of the results of horse races?

A Yes, we do.

Q All right. In what form are these records kept?

A The chart books of the Triangle Publications. They are - - during each race, and maybe thereafter - - racing charts, performance charts are made of every race. And they are published in the Daily Racing Form, which is recognized as the official record keeping publishing house for racing in the United States.

MR. MARKS: Objection, move to strike the last statement of the witness as outside of his expertise and hearsay, that it is recognized as the official - -

THE COURT: On what facts do you base that statement, Mr. Foote?

THE WITNESS: It is a matter of regulations in the State of California that it is recognized. And it is recognized, to my knowledge, by the National Association of State Racing Commissioners, which is the Association made up of the appointed racing commissioners of every state, every racing state in the United States and the provinces of Canada that do have racing, Puerto Rico and Mexico.

THE COURT: Your objection - - excuse me.

MR. MARKS: I move to strike the answer of the witness as relating hearsay as far as the regulations of the [250] State of California are concerned. I don't believe any such exists, at least not to my knowledge.

And therefore the witness is testifying from knowledge which is not his own.

THE COURT: The objection will be overruled. The motion will be denied.

BY MR. UELMEN:

Q Now, sir, do these official records of the races indicate all of the horses that were entered in a particular

race?

A No, no, they don't indicate that. They would indicate all those that had been entered and whose starting was obligatory.

Q Now, I will ask you when starting becomes obligatory after a horse is entered in a race?

A After that time which is known as scratch time, or declaration time, which is established by the Racing Association. It is usually in the morning of the day the horse is to race.

Q Now, the Racing Association is something different than the Horse Racing Board, is it not?

A Yes, it is.

Q What is the Racing Association?

A The Racing Association can be a governmental [251] entity, such as a County Fair or a private association which is licensed by the California Horse Racing Board to conduct a race meeting at a certain period of time at a certain location.

Q Now, are the charts that you referred to records kept in the ordinary course of the business of the Horse Racing Board?

A Yes.

MR. MARKS: Your Honor, I will object to the question and move to strike the answer for the purpose of objecting, on the grounds that this witness is not qualified to give that answer.

He is a law enforcement officer, not a keeper of records, and is not qualified to answer such a question.

And the question calls for hearsay and is a conclusion of the witness.

THE COURT: Your objection, if it is proper, goes only to weight, Mr. Marks. I will permit you to ask the witness all the questions you want on cross-examination.

MR. MARKS: Yes, sir.

MR. UELMEN: May the witness be handed Exhibits 1-A through 1-G.

(Documents marked Plaintiff's Exhibits 1-A through 1-G for identification.)

(The exhibits were placed before the witness.)

[252]

BY MR. UELMEN:

Q Now, you have before you, Mr. Foote, what have been marked as Exhibits 1-A to 1-G. I will ask you if all of these exhibits contain charts which have been excised from the official chart books kept in the ordinary course of business of the Horse Racing Board?

MR. MARKS: Object to the question as calling for a conclusion of the witness, without any foundation as to how the records were brought, and whether he knows of their excision.

THE COURT: Overruled.

THE WITNESS: Yes, they are.

BY MR. UELMEN:

Q Now, the exhibits are arranged according to particular horses, Mr. Foote. Have you had occasion to compare the exhibits with the chart books to insure that the exhibits contain all of the races in which each particular horse ran during a given period?

A Yes, I have had that opportunity.

Q All right. Let's start with Exhibit 1-A.

A All right.

Q Could you tell us if Exhibit 1-A contains charts for all of the races in which Sole Support was officially entered during the years 1967 through 1969? [253]

A Yes.

Q With respect to 1-B, could you tell us if this exhibit contains charts of all the races in which the horse Box of Buttons was officially entered during the years 1967 through 1969?

A Yes.

Q And with respect to Exhibit 1-C, does that contain all of the charts of all of the races in which Mr. Fourway was entered officially during the same years?

A Yes.

Q And would the same be true with respect to the horse Deerwood Duke in Exhibit 1-D?

A Yes.

Q And with respect to the horse Maretazo II in Exhibit 1-E?

A Yes.

Q And with respect to the horse King Kildare in Exhibit 1-F?

A Yes.

Q And finally, with respect to the horse Prize Candy in Exhibit 1-G?

A Yes.

MR. MARKS: Your Honor, may I have the name of that horse in Exhibit D?

THE COURT: D is Deerwood Duke. [254]

MR. MARKS: Thank you.

MR. UELMEN: Your Honor, at this time we would

move the admission in evidence of Exhibits 1-A through 1–G.

THE COURT: If you will reserve your motion until the conclusion of cross-examination, or redirect examination, Mr. Uelmen.

MR. UELMEN: Yes, sir.

Q Now Mr. Foote, I am going to ask you to explain what information is contained on the official charts of a race.

Your Honor, to facilitate this explanation I have made copies of the chart of one particular race for distribution to the jury.

THE COURT: Well, you can ask the questions on voir dire before that is done then, Mr. Marks.

MR. MARKS: Thank you. May I ask them now?

THE COURT: Certainly.

VOIR DIRE EXAMINATION

BY MR. MARKS:

Q Mr. Foote, is there some person who reports a race as it goes along, which eventually arrives at a chart which you have there?

A Several, yes.

Q And how many people? [255]

A Twelve, I would say, at a thoroughbred meeting.

Q And do the twelve people who report this race get together and arrive at a general conclusion as to what information they are going to put into a particular racing form, is that correct, sir?

A No, no.

Q Who makes the decision as to what goes into the racing form?

A The employee of the Daily Racing Form who is

assigned to the race track.

Q And that person is not a member of the Horse Racing Board, is he?

A No, he is not.

Q And he is not paid by the State to do this, is he?

A No, sir.

Q And the records that he makes are not records of the State Racing Board, or any other racing association, is that correct?

A Those particular records are not, no.

Q And those are the records from which the form is acquired?

A No, sir - - well, those are the basic records, yes, sir.

Q And whatever is in those basic records prepared [256] by the employee of the Daily Racing Form really are an expression of his opinion as to what happened at a particular race, isn't that correct?

A I find that hard to answer. No, I wouldn't say - -

Q Well, - -

A It is a matter of opinion.

Q Well, there is, for instance, a racing form that shows how many lengths a horse was behind the winner. And lengths means a horse's length, isn't that right? The length of a horse?

A Yes.

Q All right. Are those lengths measured while the horses are running, or is it somebody expressing an opinion as to the distance?

A They are measured.

Q By whom?

A By a number of things. The electronic timing at the finish line, the multiple photographs that are made, photographs of the photo finish, in addition to the movie camera or the closed circuit TV, which is on video tape.

And then these are reviewed before this is finalized.

In addition the clocker makes notes as to where - - they have up to three clockers that clock the horses in [257] various positions.

I wouldn't say it is one man's opinion - -

Q Well - -

A It is a collection of facts - -

Q Well, it is the Daily Racing Form's man's collection of whatever facts these other persons have put together during the course of a race, is that right?

A Yes, certainly.

Q And the Horse Racing Board takes the Daily Racing Form, which is a private enterprise, and puts that into chart books, is that correct?

A No. We don't publish them, no. It is published by the Triangle Publications.

Q Which is a private enterprise?

A Yes.

Q And you purchase the publications, don't you?

A Just like law books, we purchase racing forms, right.

Q All right. What regulation of the State of California says that the Daily Racing Form is the official publication and books and records of the California Horse Racing Association?

A You mean a Section in the –

Q Yes.

A California Administrative Code? [258]

Q Yes.

A No, there is none in the - -

Q There is none, isn't that correct?

A That is correct.

Q And there is none by statute?

A No, there is none by statute.

Q And the only reason that the California Horse Racing Association has these particular chart books is because it helps them in the course of some of their business, correct?

A No, we have to buy them. We order them pursuant to an order of the Board.

Q But the Board makes the order, not by any statute, does it? There is no statute that says that they must order these books, is that right?

A No, no.

Q And there is no regulation that says they must order these books, is that right?

A I don't - -

Q There is none that you know of?

A No, there is no California Administrative Code regulation, that's right.

Q So the Board - - all the Board does is authorize the payment of money for the purchase of the books which you feel are of convenience to the Horse Racing Association, [259] isn't that right;

A Well - -

Q This is very valuable information in these chart books, isn't that right?

A Absolutely. They are very accurate. That is why we keep them.

Q That's right. But they are not books and records kept in the business of the California Horse Racing Association, are they?

A We keep those in the normal course of our business.

Q They are purchased, are they not?

A Yes, sir.

Q And they are not kept by the California Horse Racing Association, is that not correct? They are kept by the Triangle Publications and purchased by the California Horse Racing Association, is not that true?

A No. You are mixing your terms, sir.

Q Which employee of the California Board - - what is the official name?

A California Horse Racing Board.

Q Yes. Which official of the California Horse Racing Board keeps and maintains the records of the chart books?

A I do.

Q You prepare them? [260]

A No, I keep the records of them.

Q You purchase them and put them in your office?

A Yes, certainly.

MR. MARKS: I have nothing further, your Honor.

I will object to the admission of any chart books or forms as not being any official business records.

THE COURT: Mr. Uelmen.

DIRECT EXAMINATION (CONTINUED)

BY MR. UELMEN:

Q Mr. Foote, is California Horse Racing Board authorized by statute to promulgate its own regulations?

A Yes, it is.

Q All right. Does that authority include the authority to recognize what records will be official records of the Board?

A Yes, it does.

MR. MARKS: I object to that as calling for a conclusion of the witness.

THE COURT: Overruled.

BY MR. UELMEN:

Q Now, in exercising this delegated authority has the Horse Racing Board given any official recognition to the records maintained by the Daily Racing Form as [261] official records?

MR. MARKS: Objection, calls for a conclusion of this witness and not authorized by his position with the Board.

THE COURT: Overruled.

THE WITNESS: Yes, they have.

MR. UELMEN: Your Honor, again I will move the admission of these exhibits.

The Federal Business Records Act does not require that the person compiling the records be on the payroll of the organization that maintains the records. This is a function that can be delegated by contract, as long as they have the official sanction of the Horse Racing Board they are official records of that body.

MR. MARKS: May I ask a couple more questions, your Honor.

THE COURT: Certainly, Mr. Marks.

VOIR DIRE EXAMINATION

BY MR. MARKS:

Q What official regulation authorizes these chart

books as being the official chart books of the California Horse Racing Board?

A I can't think of any particular regulation which says that the Daily Racing Form is the one and only [262] chart book, except that all the conditions for a race are promulgated upon past performances.

And the Board recognizes officially, by Board order, that the Daily Racing Form is the only recognized authority for this, except when the horse is foreign bred.

Q Do you have that Board order?

A I can certainly obtain it. I don't have it with me, no.

MR. MARKS: Could we, your Honor, defer a ruling, if it becomes important as to the opinion - -

THE COURT: I don't think so, Mr. Marks.

Any other questions?

MR. MARKS: Your Honor, I would state very briefly now that to me this is like the purchasing of a novel from a book store and saying that that is the authority upon which we base our - -

THE COURT: You can draw a better analogy than that, for heaven sakes.

MR. MARKS: Buying a newspaper and saying that the charts in the daily newspaper are the official - -

THE COURT: How about the Congressional Record.

MR. MARKS: That, I understand, can be changed if the congressmen want it changed.

THE COURT: All right. Any claim that these charts are not trustworthy and accurate? [263]

MR. MARKS: Absolutely, your Honor.

THE COURT: Your evidence in that regard?

MR. MARKS: That the charts are a compilation - -

THE COURT: Your evidence, evidence that these charts are not accurate and correct, are not trustworthy.

MR. MARKS: I have - -

THE COURT: Do you have any evidence to show that these charts kept by the California Horse Racing Board and obtained from Triangle Publications are not trustworthy?

MR. MARKS: Not at this time.

THE COURT: All right.

MR. MARKS: Although I may have - -

THE COURT: All right. The motion will be overruled.

Exhibits 1-A, B, C, D, E, F, and G will be received in evidence.

(Plaintiff's Exhibit 1-A through G for identification were received in evidence.)

MR. MARKS: May I have the motion to strike reserved?

THE COURT: Any time you can bring any evidence, Mr. Marks, the Court will certainly permit you to.

MR. MARKS: Thank you.

THE COURT: But don't bring any novels in. [264]

DIRECT EXAMINATION (CONTINUED)

BY MR. UELMEN:

Q May the copies of the twelfth race on September 25, 1968, contained in Exhibit 1-D be distributed to the jury?

THE COURT: Yes. Mr. Largen.

(Whereupon the exhibits were handed to the jurors.)

MR. MARKS: Your Honor, just briefly for the record only, I would like to show that the objection also includes the objection to the business records exception to the hearsay rule, if that is the basis upon which these are admitted,

which is a denial of confrontation of witnesses.

THE COURT: Yes. I think your objection clearly shows that.

MR. MARKS: Yes.

[Page 420, line 18 - page 423, line 4]

MR. MARKS: Your Honor, on behalf of Mr. Garner I would like to first offer a stipulation, your Honor.

It is stipulated between counsel, for the purpose of my particular motion, that at the previous trial, prior to the commencement of the trial, Mr. Garner, through his counsel, made a motion for severance from Defendant Swank.

Said motion was opposed by the Government and [421] said motion was denied by the Court.

Is that so stipulated?

MR. UELMEN: So stipulated.

MR. MARKS: On the basis of that action by the Government, which prevented Mr. Garner from having access to the testimony of Mr. Swank, through the use of the subpoena powers or otherwise, Mr. Swank, for the record having declined to testify in his own behalf, I ask that the Court invoke its own supervisorial powers and deny the Government the right to now call Mr. Swank.

THE COURT: You are going to have to educate me as to your motion.

MR. MARKS: My motion - -

THE COURT: Because I don't understand it.

MR. MARKS: My motion - -

THE COURT: Are you saying that because there wasn't a severance in another trial the Government can't produce a witness at this trial?

MR. MARKS: Cannot produce a witness which they, through their own chicanery, if you want to use that word, have denied Mr. Garner the right to the access of a witness.

Now, I will explain the proposition. Mr. Swank was a co-defendant. He was an alleged co-conspirator at that trial. He had an absolute right not to testify.

Mr. Garner could not obtain the testimony of [422] Mr. Swank - -

THE COURT: I am not talking about that trial. That trial is a nonentity, isn't it?

MR. MARKS: The Government, in its opposition to the motion to sever - - if there had been a severance and Mr. Garner could have probably secured the testimony of Mr. Swank, that it was not to be used against him in any other proceeding, so that Mr. Garner could have the opportunity of a defense.

THE COURT: Oh, all right. I understand your motion now.

MR. MARKS: All right. Now, I say that the Government is estopped by its own desire to prevent Mr. Garner from having a witness at an earlier trial, from using this immunity type of doctrine, which is statutorially authorized, to produce the witness at a later time against Mr. Garner.

And since they produced the situation they cannot benefit by it, and the Court, as I say, under its own supervisorial powers and under just a question of due process of law, and I would say under the combined doctrine

of *Bruton* and *Green*, they don't have the right to call this witness.

THE COURT: Mr. Uelmen. [423]

MR. UELMEN: I have to confess I don't quite understand Mr. Marks' motion.

THE COURT: All right. The motion will be denied.

[Page 1201, line 8 - page 1209, line 18]

DIRECT EXAMINATION (of Roy Garner)

BY MR. MARKS:

Q Mr. Garner - - may the witness have Exhibit 19?

THE COURT: Mr. Murphy.

(The exhibit was placed before the witness.)

BY MR. MARKS:

Q Mr. Garner, do you file income tax records every year?

A I do.

Q Did you file one in - - is that for 1968?

A 1967.

Q You filed that in 1968, is that correct?

A Yes.

Q Now, before you filed that, signed and filed that particular report with the Federal Government, did you have any knowledge or understanding in your mind as to whether or not those records were confidential or whether they could be used in court? [1202]

A I believed them to be confidential. I had been advised that they were by an attorney.

Q And is that the reason that you did file it?

A Yes.

MR. MARKS: Cross examine.

THE COURT: Mr. Uelmen.

CROSS EXAMINATION

BY MR. UELMEN:

Q Mr. Garner, what attorney advised you that they were confidential?

A Larry Thorne.

Q When did he give you that advice?

A Larry Thorne has been my family attorney for years. I couldn't tell you the specific time, sometime before I filed, the first time I filed showing gambling income on an income tax return.

Q Now, did Mr. Thorne tell you that they were absolutely inviolable, that the confidentiality of them could never be uncovered for any reason?

A That was his opinion.

MR. UELMEN: Nothing further.

THE COURT: Mr. Marks.

MR. MARKS: That is all I have.

THE COURT: You may step down, Mr. Garner.

(Witness excused.) [1203]

MR. MARKS: And in further objection to the introduction of the records, your Honor, I would offer the argument - - and I think it was presented by Mr. Saltzman and Mr. Winsberg in the earlier case - - with respect to the fact that apparently a presidential directive must be had

in order to have income tax records opened and divulged.

So I would object, your Honor, on the grounds I believe it is the *Haines, Grosso* and *Marquette* cases, and there is one later case about income tax records where the Supreme Court - - if I recall it - - the Supreme Court said they couldn't use the privilege against self incrimination to file false income tax reports, but the implication of that case - - and I can't remember the name of it - - but the implication of that case certainly is that it could not be used if the only cause of using the report was to incriminate the person in some way for the fact of filing.

THE COURT: Mr. Uelmen.

MR. UELMEN: Your Honor, the confidentiality of income tax returns and the circumstances under which they can be disclosed is a matter of law promulgated by Congress and promulgated by the Secretary of the Treasury under statutes enacted by Congress.

If an individual's erroneous belief as to what the law is were held to create some privilege that did not normally exist, of course any effort to regulate this con- [1204] fidentiality by Congress would be frustrating. We could have the situation of someone saying, somebody told me that police officers can't come into my apartment, therefore any contraband that was discovered in my apartment should be suppressed because I thought I had an absolute privilege of secrecy in my apartment. That simply isn't the law.

The law has spoken as to under what circumstances these income tax returns can be divulged. And it is quite clear it is not an absolute privilege of confidentiality.

Within the Internal Revenue Code there is authorization for the Secretary of the Treasury to promulgate

regulations as to when income tax returns can be disclosed. That regulation has been promulgated in Title 26 of the Code of Federal Regulations, Section 458.204. There has been full compliance with this provision of the Code of Federal Regulations.

At the time of the Motion to Suppress the income tax returns in the last trial we made the record, or the letter requesting release of these returns a matter of record as an exhibit in the case. And it indicates full compliance with all of these statutes and regulations.

THE COURT: What exhibit would that be, Mr. Murphy?

MR. UELMEN: I think Mr. Murphy will have the [1205] answer to that.

THE COURT: Where would it be now, that exhibit?

MR. UELMEN: The exhibits have been retained in the clerk's office, so it would still be here, your Honor.

MR. MARKS: Your Honor.

THE COURT: Yes.

MR. MARKS: I have one observation. As I understand the case - - and I am challenging the validity of the regulation - - the Supreme Court, in my understanding, has said there are times when the Government can impose or overcome certain privileges where they can show a particularized need for having the information.

The only need or use that the Government has to reveal the contents of an otherwise confidential memorandum in this case is the need to try and use it as evidence against the defendant, which is not the type of need that the Supreme Court was indicating.

If the Government, in the course of function of its

business may have a need to disclose records for the purpose of statistics, or bringing out some fact, but not, it can't say it has a need to convict a person by overcoming his privilege against self incrimination, because this is compelled testimony. The Government requires that a person file an income tax return. And failure to do so [1206] is a crime.

THE COURT: All right.

We will take our recess now. Mr. Murphy, if you can obtain that exhibit that was entered, introduced in the prior trial, then Mr. Uelmen, if you and Mr. Marks can get together with Mr. Stefanak concerning the telephone information concerning Mr. Long - - and how many witnesses would you have, Mr. Marks?

MR. MARKS: There would be four or five short witnesses, your Honor. But none of them are here.

THE COURT: None are here?

MR. MARKS: Because of some miscalculations as to the type of testimony and what was going to - -

THE COURT: All right. We can spend the rest of the day settling instructions and maybe hearing the motions.

MR. MARKS: I do have a motion that I am thinking about, your Honor.

THE COURT: All right. We will take a recess and then when you are ready let Mr. Murphy know and we will resume outside the presence of the jury, first of all.

(Short recess.)

THE COURT: Mr. Marks.

(Whereupon the following proceedings were had in open court but outside the presence and hearing of the jury:) [1207]

MR. MARKS: Are we here now with respect to Mr. Stefanak's testimony, your Honor?

THE COURT: Mr. Stefanak and also the income tax return, Mr. Marks.

MR. MARKS: Yes, sir.

I understand they cannot find the Exhibit 55, your Honor.

I object to the introduction or receipt of the exhibit for the reasons stated to the Court, the objections to the Court.

THE COURT: Mr. Murphy handed me a Xerox copy of a Fifth Circuit case and said that you gave it to him.

MR. MARKS: That is for my Motion for Judgment of Acquittal, your Honor.

THE COURT: Well, that case says that Grimes, who was the appellant, contends that the introduction - - this is on Page 796 of 79 Fed. Reporter 2d, "Grimes, the appellant, contends that the introduction of his 1960 income tax return in which he stated his business was gambling violated his Fifth Amendment rights. We believe this contention to be without merit."

MR. MARKS: I believe that case is before the Supreme Court, your Honor, and the other ones I cited.

THE COURT: All right.

MR. MARKS: The case there was cited with par- [1208] ticular respect to Count Two and the telephone calls.

THE COURT: All right.

MR. MARKS: Which is more in point.

THE COURT: All right. Mr. Uelmen.

MR. UELMEN: Your Honor, with respect to Exhibit 55, I have been informed that - -

THE COURT: This is 55 of the first trial?

MR. UELMEN: Of the first trial; I have been informed

that the clerk has misplaced this with a number of other exhibits that were not admitted into evidence, but were marked for identification in the course of the trial.

I have located the transcript reference, however, at Page 2290 of the transcript of the first trial, February 18, 1970, when the letter was marked and admitted and there was reference to the fact in the transcript that the letter indicated that the Government had written to the Internal Revenue Service in compliance with Section 6103 of the Internal Revenue Code.

If the Court deems it necessary I can inquire of the Internal Revenue Service whether they have the original of the letter still on file. I am sure what was marked as an exhibit was a carbon copy of the letter from our file.

The Supreme Court last addressed itself to the problem of the admissibility of income tax returns for the purpose for which we are offering them in the case of *United* [1209] *States v. Sullivan,* almost 50 years ago.

THE COURT: I don't think I need any argument on the law, Mr. Uelmen.

MR. UELMEN: I just wanted to point out that even after *Grimes* and *Marquette* the Court distinguished *Sullivan* and indicated that was still the law.

THE COURT: The Court having presided at the previous trial in which Exhibit No. 55 was received for the purpose of laying a foundation for the introduction of the income tax returns of Mr. Garner in that trial, the Court will take judicial knowledge of all of the proceedings which took place in the prior trial in that regard.

There is no contention, is there, Mr. Marks, that Exhibit 19 is not the tax returns of Mr. Garner?

MR. MARKS: No.

THE COURT: All right. The objection will be overruled.

19 will be received in evidence.

[Page 1365, line 9 - page 1366, line 12]

All right. We know Swank was getting the horses from another source. We know that Mr. Garner was aware of this arrangement between Mr. Swank and Mr. Lawler.

And we also know something else about Mr. Garner. We know Mr. Garner was himself in the business of betting and wagering. That is Mr. Garner's business.

We know that because Exhibit 19 is in evidence. And Exhibit 19, which you will see in the jury room, is income tax return which Mr. Garner filed with the Federal government for the years 1965, 1966 and '67.

You will see from these tax returns that in 1965, for example, Mr. Garner listed as his occupation on the tax return "Professional Gambler," self-employed; that he reported a total income for that year of approximately $8,200.00, of which $8,020.00 was derived from wagering income.

You will see for the year 1966 that Mr. Garner [1366] reported a total income of $22,000.00, all of which was derived from wagering income.

We will note that in 1967 Mr. Garner declared an income from wagering in excess of $25,000.00, reporting a loss on his horse racing ventures, his ownership of race horses, of approximately $12,500.00, and a total income of $12,500.00.

So we know Mr. Garner himself was no stranger to the

business of wagering and gambling.

Now, how do we go beyond this to show that Mr. Garner was the source from which Mr. Swank was getting the horses he was betting?

United States of America

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Date: January 21, 1970

TO) WHOM THESE PRESENTS SHALL COME, GREETING:

I y that the annexed are true and correct copies of Form 1040, U. S. Individual Income Tax Return filed by Roy D. and Rowena Garner, Social Security Numbers 565-34-2357 (H) and 562-30-6316 (W) for taxable periods ending 1967, 1966 and 1965

On in this office.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of this office to be affixed. on the day and year first above written.

By direction of the Secretary of the Treasury:
F. S. Schmidt, District Director

By: F P Harrington
F. P. Harrington, Acting Chief
Special Procedures Section

FORM 2866 (REV. 10-62)

Please attach Check or Money Order here

... Street
ONTARIO, CALIFORNIA

(1) INCLUDE 3% UNDERESTIMATE PENALTY FORM ... ATTACHED.

F1

532221186997

1040 U.S. Individual Income Tax Return

U.S. Treasury Department, Internal Revenue Service

for the year January 1–December 31, 1967, or other taxable year beginning ..... , 1967, ending ..... , 19 .....

1967

Please print or type

First name and initial (If joint return, use first names and middle initials of both)	Last name	Your social security number
ROY D & ROWENA	GARNER	565 34 2357
Home address (Number and street or rural route)		**Your occupation**
754 W. AZURE CT.		HORSEMAN
City, town or post office, and State	**ZIP code**	**Spouse's social security number**
ONTARIO, CALIFORNIA	91762	562 30 6316
If you have below name and address on your return for 1966 (if same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1966 names and addresses	SAME	**Spouse's occupation** HOUSEWIFE
Your present employer and address	SELF	
Spouse's present employer and address, if joint return		

2

Your Filing Status—check only one:

1a ☐ Single
1b ☒ Married filing joint return (even if only one had income)
1c ☐ Married filing separately. If spouse is also filing a return, enter her (his) social security number in space provided above and give first name here .....
1d ☐ Unmarried Head of Household
1e ☐ Surviving widow(er) with dependent child

Your Exemptions

	Regular	65 or over	Blind	
2a Yourself . . .	☒	☐	☐	Enter number of boxes checked ▶ 2
2b Spouse . . .	☒	☐	☐	

3a First names of your dependent children who lived with you PHYLLIS, JOHN — Enter number ▶ 2

3b Number of other dependents (from page 2, Part I, line 3)

4 Total exemptions claimed . . . . . ▶ 4

Please attach Copy 3 of Form W-2 here

Income If joint return include all income of both husband and wife	5	Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation	5	
	6	Other income (from page 2, Part II, line 8)	6	12,463 91
	7	Total (add lines 5 and 6)	7	12,463 91
	8	Adjustments to income (from page 2, Part III, line 5)	8	
	9	Total income (subtract line 8 from line 7)	9	12,463 91
Find tax from table —OR— **Figure tax using tax rate schedules**	10	If you do not itemize deductions and line 9 is less than $5,000, find your tax from tables in instructions. Do not use lines 11a, b, c, or d. Enter tax on line 12.	10	
	11a	If you itemize deductions, enter total from page 2, Part IV, line 17. If you do not itemize deductions, and line 9 is $5,000 or more enter the larger of: (1) 10 percent of line 9; OR (2) $200 ($100 if married and filing separate return) plus $100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to $1,000 ($500 if married and filing separately).	11a	3,030 32
	11b	Subtract line 11a from line 9	11b	9,433 59
	11c	Multiply total number of exemptions on line 4, above, by $600	11c	2,400 00
	11d	Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12.	11d	7033 59
Your Tax, Credits, and Payments	12	Tax (from either Tax Table, see line 10, or Tax Rate Schedule, see lines 11a–11d)	12	1,196 38
	13	Total credits (from page 2, Part V, line 4)	13	
	14a	Income tax (subtract line 13 from line 12)	14a	1,196 38
	14b	Tax from recomputing prior year investment credit (attach statement)	14b	
	15	Self-employment tax (Schedule C-3 or F-1)	15	
	16	Total tax (add lines 14a, 14b, and 15)	16	1,196 38
	17	Total Federal income tax withheld (attach Forms W-2)	17	
	18	Excess F.I.C.A. tax withheld (two or more employers—see page 5 of instr.)	18	
	19	☐ Nonhighway Federal gasoline tax—Form 4136. ☐ Reg. Inv.—Form 2439	19	
	20	1967 Estimated tax payments (include 1966 overpayment allowed as a credit)	20	
	21	Total (add lines 17, 18, 19, and 20)	21	NONE
Balance Due or Refund	22	If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return	22	1234 66 ①
	23	If payments (line 21) are larger than tax (line 16), enter Overpayment	23	
	24	Amount of line 23 you wish credited to 1968 Estimated Tax	24	
	25	Subtract line 24 from 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☐ Refund only	25	

Please attach Check or Money Order here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here

Your signature ROY D. GARNER Date 4/13/68

Spouse's signature (If filing jointly, BOTH must sign even if only one had income) ROWENA GARNER Date 4/13/68

Signature of preparer (Other than taxpayer) GENE PORTER Date 4/13/68

Address 1047 W. 6th Street

CERTIFIED PUBLIC ACCOUNTANT

ONTARIO, CALIFORNIA

TAXAN FORMS CO.

① INCLUDES 38.28 UNDERESTIMATE PENALTY
FORM 2210 ATTACHED.

F1

61

BEST COPY AVAILABLE

BEST COPY AVAILABLE

Exempti... Complete only for dependents claimed on line 3b, page 1

(a) NAME (If more space is needed attach schedule)	(b) Relationship	(c) Mo. the live in your home. If born or died during year write "B" or "D"	(d) If 4 dependent have income of $1000 or more	(e) Amount YOU furnished for dependent's support, if 100% write "ALL"	(f) Amount furnished by Others including dependent
1				$	$
2					

3 Total number of dependents listed above. Enter here and on page 1, line 3b . . . . . ▶

Income from sources other than wages, etc.

1a Gross dividends and other distributions on stock (list payers and amounts—write (H), (W), (J), for stock held by husband, wife, or jointly) .....

Total line 1a . . . . . ▶

1b Exclusion (see instructions) .....

1c Capital gain distributions (see page 6 of instructions) .....

1d Nontaxable distributions (see page 6 of instructions) .....

1e Total (add lines 1b, 1c, and 1d) . . . .

1f Taxable dividends (line 1a less line 1e—not less than zero) . . . . . ▶

Interest (list payers and amounts below)

Earnings from savings and loan assoc. and credit unions.

.....

Other interest (banks, bonds, tax refunds, etc.)

UNITED SAVE BANK 8.32

2 Total interest income . . . . . ▶ 8.32

3 Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc. (attach Sch. B) .

4 Business income or loss (attach Schedule C) . . (12,344.41)

5 Sale or exchange of property (attach Schedule D) .

6 Farm income or loss (attach Schedule F) . . .

Miscellaneous income (state nature and source)

WAGERING INCOME (W) 25,400.00

7 Total miscellaneous income . . . . ▶ 25,400.00

8 TOTAL (add lines 1f, 2, 3, 4, 5, 6, and 7). Enter here and on page 1, line 6 . . . ▶ 12,463.91

Adjustments to income

1 "Sick pay" if included in line 5, page 1 (attach Form 2440 or other required statement) .

2 Moving expenses (attach Form 3903) . .

3 Employee business expense (attach Form 2106 or other statement) . . . . .

4 Payments by self-employed persons to retirement plans, etc. (attach Form 2950SE) .

5 TOTAL ADJUSTMENTS (lines 1 through 4).

Itemized deductions – Use only if you do not use tax table or standard deduction.

Medical and dental expense (not compensated by insurance or otherwise)—Attach itemized list.

1 One half (but not more than $150) of insurance premiums for medical care . .

2 Total cost of medicine and drugs . . .

3 Enter 1% of line 9, page 1 . . . . .

4 Subtract line 3 from line 2 (not less than zero)

5 Other medical, dental expenses (include balance of insurance premiums for medical care not deductible on line 1) . . . 1048

6 Total (add lines 4 and 5) . . . . . .

7 Enter 3% of line 9, page 1 . . . . .

8 Subtract line 7 from line 6 (not less than zero) .

9 Total (add lines 1 and 8) . . . . . ▶ 670.22

Contributions.—Cash—including checks, money orders, etc. (itemize) .....

10 Total cash contributions . . . . . .

11 Other than cash (see instructions for required statement). Enter total of such items here .

12 Carryover from prior years (see page 9 of instr.)

13 Total contributions (add lines 10, 11, and 12—see instructions for limitation) ▶ 17500

Taxes.—Real estate . . . . . .

State and local gasoline . . . . .

General sales (see page 15 of instructions) .

State and local income . . . . . .

Personal property

14 Total taxes SCH A ATTACHED ▶ 1108.45

Interest expense.—Home Mortgage . . .

Other (itemize) .....

15 Total interest expense SCH A ATTACHED ▶ 948.45

Miscellaneous deductions.—(see page 9 of instructions) .....

16 Total miscellaneous SCH A ATTACHED ▶ 32.00

17 TOTAL DEDUCTIONS (add lines 9, 13, 14, 15, and 16). Enter here and on page 1, line 11a ▶ 3030.22

Credits

1 Retirement income credit (Schedule D) .

2 Investment credit (Form 3468) . . . .

3 Foreign tax credit (Form 1116) . . . .

4 TOTAL CREDITS (for page 1, line 13) . ▶

EXCESS ACCOUNTS If you had an excess allowance or claimed

67

BEST COPY AVAILABLE

SCHEDULE C (Form 1040)
Department of the Treasury
Internal Revenue Service

Profit (or Loss) From Business or Profession

(Sole Proprietorships)

(Compute social security self-employment tax on Schedule C-3 (Form 1040))

1967

Attach this schedule to your income tax return, Form 1040 — Partnerships, joint ventures, etc., must file on Form 1065

Name and address as shown on page 1, Form 1040

R.D. & R. GOCKEN - 754 W. AZUSA CT. - UPLAND, CALIF

A Principal business activity (See separate instructions) HORSE RACING product (For example, retail—hardware; wholesale—tobacco; services—legal; manufacturing—furniture; etc.) 7940

B Business name BIRDIE STABLES C Employer Identification Number

D Business address if different from above, otherwise enter "same" SAME (ZIP code)

E Indicate method of accounting: (1) [X] cash. (2) [ ] accrual; (3) [ ] other.

F Was an Employer's Quarterly Federal Tax Return, Form 941, filed for this business for any quarter in 1967? [ ] Yes [X] No.

G Is this business located within the boundaries of the city, town, etc., indicated on Line D? [X] Yes [ ] No.

H Did you own this business at the end of 1967? [X] Yes [ ] No.

I How many months in 1967 did you own this business? 12

1	Gross receipts or gross sales $46047 Less: Returns and allowances $		$ 46,047.00
2	Inventory at beginning of year (if different from last year's closing inventory attach explanation)		
3	Merchandise purchased $ less cost of any items withdrawn from business for personal use $	33,153.00	
4	Cost of labor (do not include salary paid to yourself)		
5	Material and supplies		
6	Other costs (explain in Schedule C-1)		
7	Total of lines 2 through 6	33,153.00	
8	Inventory at end of this year	700.00	
9	Cost of goods sold (subtract line 8 from line 7)		32,453.00
10	Gross profit (subtract line 9 from line 1)		13,594.00
	OTHER BUSINESS DEDUCTIONS		
11	Depreciation (explain in Schedule C-2)	1,600.50	
12	Taxes on business and business property (explain in Schedule C-1)	165.58	
13	Rent on business property		
14	Repairs (explain in Schedule C-1)		
15	Salaries and wages not included on line 4 (exclude any paid to yourself)		
16	Insurance		
17	Legal and professional fees		
18	Commissions		
19	Amortization (attach statement)		
20	Retirement plans, etc. (other than your share—see separate instructions)		
21	Interest on business indebtedness		
22	Bad debts arising from sales or services		
23	Losses of business property (attach statement)		
24	Depletion of mines, oil and gas wells, timber, etc. (attach schedule)		
25	Other business expenses (explain in Schedule C-1)	25,172.33	
26	Total of lines 11 through 25	1247	26,538.41
27	Net profit (or loss) (subtract line 26 from line 10). Enter here; in Schedule C-3, line 1; and on Form 1040, page 2, Part II, line 4		(12,944.41)

SCHEDULE C-1. EXPLANATION OF LINES 6, 12, 14, AND 25

Line No.	Explanation	Amount
12	P.R.S. PROP TAX	$ 105.58
✓	CALIF. HORSE RACING BOARD LICENSE	60.00
		165.58

Line No.	Explanation	Amount
25	SCH #2 ATTACHED	$ 25,172.33

(C)

NO FORMS CO.

2 11 17 27

63

Form 1040) 19 67

SCHEDULE C-2. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 11

This schedule is designed for taxpayers using the alternative guidelines and administrative procedures described in Revenue Procedures 62-21 and 65-13 as well as for those taxpayers who wish to continue using practices authorized prior to these revenue procedures. Where double headings appear use the first heading for depreciation under Revenue Procedures 62-21 and 65-13 and the second heading for other authorized practices.

1. Group and guideline class — OR — Description of property	2. Cost or other basis at beginning of year — OR — Cost or other basis	3. Asset additions in year (amount) — OR — Date acquired	4. Asset retirements in year (amount) (applicable only to Rev. Proc. 62-21)	5. Depreciation allowed or allowable in prior years	6. Method of computing depreciation	7. Class life — OR — Rate (%) or life	8. Depreciation for this year
1 Total additional first-year depreciation (do not include in items below)							
1967 CADILLAC	$ 700 00	10/66	SOLD (1) 10/67	-0-	SL	3 Yrs	700 00
1968 CADILLAC	6,012.00	10/67		-0-	SL	3 YRS	500 50 3 mo
SOLD	(5,700.00)						
(1) SOLD FOR $700 - NO GAIN OR LOSS ON SALE							
2 Totals	6,012.00						1,200 50
3 Less: Amount of depreciation claimed elsewhere in Schedule C							
4 Balance—Enter here and on page 1, line 11							1200 50

SUMMARY OF DEPRECIATION

	Straight line	Declining balance	Sum of the years digits	Units of production	Additional first year (section 179)	Other (specify)	Total
1 Under Rev. Procs 62-21 & 65-13							
2 Other . . .	1200 50						1200 50

EXPENSE ACCOUNT INFORMATION N/A

Enter information with regard to yourself and your five highest paid employees. In determining the five highest paid employees, expense account allowances must be added to their salaries and wages. However, the information need not be submitted for any employee for whom the combined amount is less than $10,000, or for yourself if your expense account allowance plus line 27, page 1, is less than $10,000. See separate instructions for Schedule C, for definition of "expense account."

Name	Expense account	Salaries and wages
Owner		
1		
2		
3		
4		
5		

Did you claim a deduction for expenses connected with: (If answer to any question is "YES," check applicable boxes within that question.)

J A hunting lodge . . . . . ☐
working ranch or farm . . . ☐
fishing camp . . . . . ☐
resort property . . . . . ☐
pleasure boat or yacht . . . ☐
or other similar facility . . . ☐?
(Other than where the operation of the facility was your principal business.) ☐ YES ☐ NO

K Vacations for you or members of your family, or employees or member of their families? (Other than vacation pay reported on Form W-2.) ☐ YES ☐ NO

L The leasing, renting, or ownership of a hotel room or suite ☐, apartment ☐, or other dwelling ☐, which was used by you, your customers, employees, or members of their families? (Other than use by yourself or employees while in business travel status.) ☐ YES ☐ NO

M The attendance of members of your family or your employees' families at conventions or business meetings? ☐ YES ☐ NO

ADDITIONAL INFORMATION

1 Was there any substantial change in the manner of determining quantities, costs, or valuations between the opening and closing inventories? ☐ YES ☒ NO. If "Yes," attach explanation.

2 Are you liable for filing Forms 1096 and 1099 or 1087 for the calendar year 1967? (See last paragraph of separate instructions for Schedule C.) ☐ YES ☒ NO. If "Yes," where were they filed? .....

64

BEST COPY AVAILABLE

Form 2210
U.S. Treasury Department
Internal Revenue Service

Statement Relating to Underpayment of Estimated Income Tax by Individuals

(To be filed with Form 1040 or Form 1040A)

1967

Name and address as shown on Form 1040

R.D. & R. GAINER - 754 W. AZURE CT. - UPLAND, CALIF

Social Security Number: 565 30 2257

PART I.—FOR ALL INDIVIDUALS (See Instruction A.)

1 1967 Tax (enter amount shown on line 16, page 1 of Form 1040, or line 8 of Form 1040A)	$ 1196.38
2 Tax credit claimed for gasoline and lubricating oil in 1967 from Form 4136	-0-
3 Taxes adjusted (line 1 less line 2)	1196.38
4 Amount on line 3 multiplied by 80% (farmers and fishermen use 66⅔%)	$ 957.10

PART II.—FOR ALL INDIVIDUALS EXCEPT FARMERS AND FISHERMEN (Farmers and Fishermen Use Part III)

How to figure your underpayment, see Instruction D

	Due Dates of Installments: Apr. 15, 1967	June 15, 1967	Sept. 15, 1967	Jan. 15, 1968
1 Divide amount on line 4, Part I, by the number of installments required for the year and enter result in appropriate columns. (See Instruction B)	$ 239.27	$ 239.28	$ 239.27	$ 239.28
2 Amounts paid on estimate for each period, and tax withheld [1]	$ -0-	$ -0-	$ -0-	$ -0-
3 Overpayment of previous installment [2]	-0-	-0-	-0-	-0-
4 Total of line 2 and line 3	-0-	-0-	-0-	-0-
5 Underpayment (line 1 less line 4) or overpayment (line 4 less line 1)	$ 239.27	$ 239.28	$ 239.27	$ 239.28

Exceptions which void the "additional charge," see Instruction E

6 Total amount paid or withheld from Jan. 1 through the installment date indicated	$	$	$	$
7 Exception 1. 1966 tax $	25% of 1966 tax $	50% of 1966 tax $	75% of 1966 tax $	100% of 1966 tax $
8 Exception 2. Tax based on 1966 income, 1967 rates and exemptions $	25% of this tax $	50% of this tax $	75% of this tax $	100% of this tax $
9 Exception 3.	20% of tax on annualized income $	40% of tax on annualized income $	60% of tax on annualized income $	
10 Exception 4.	90% of tax (Jan. 1 thru Mar. 31) $	90% of tax (Jan. 1 thru May 31) $	90% of tax (Jan. 1 thru Aug. 31) $	

How to figure the "additional charge," see Instruction F

11 Amount of underpayment (from line 5, Part II)	$ 239.27	$ 239.28	$ 239.27	$ 239.28
12 Date of payment or April 15, 1968, whichever is earlier [3]	4/15/68	4/15/68	4/15/68	4/15/68
13 Number of days from due date of installment to the date shown on line 12 above	366	305	213	91
14 Additional charge (6 percent per year on the amount on line 11 for the number of days shown on line 13)	$ 14.36	$ 11.96	$ 8.37	$ 3.57
15 Total of amounts on line 14. On page 1, of your income tax return, show this amount in the bottom margin as "Additional Charge" and increase line 22 or decrease line 23 accordingly				$ 38.26

PART III.—FOR FARMERS AND FISHERMEN. It is not necessary to file this form if your return is filed and tax due paid by February 15, 1968

See Instruction D	1 Enter the amount shown on line 4, Part I (the minimum amount due on Jan. 15, 1968)	$
	2 Amounts withheld during 1967 and amounts paid or credited, by Jan. 15, 1968	
	3 Underpayment of estimated tax (line 1 less line 2)	$
See Instruction E	4 Exception 1.—Tax shown on 1966 return	$
	5 Exception 2.—Tax based on 1966 income, using 1967 rates and exemptions	$
See Instruction F	6 Number of days from Jan. 15, 1968, to date of payment or Apr. 15, 1968, whichever is earlier	
	7 Additional charge (6 percent per year on the amount shown on line 3, Part III, for the number of days shown on line 6, Part III). On page 1 of your tax return, show this amount in the bottom margin as "Additional Charge" and increase line 22 or decrease line 23 accordingly	$

[1] An equal part of the tax withheld during the year may be considered paid on each required installment date unless you establish the dates on which withholding occurred and consider such withholding as paid on the date when actually withheld. If your return was filed by January 31, 1968, and the balance of tax paid in full, include such balance on line 2, Part II for the January 15, 1968, installment.

[2] Any overpayment of an installment on line 5 in excess of all prior underpayments should be applied as a credit against the next installment.

[3] If you made more than one payment for a given installment, attach statement showing separate computation for each payment. If you filed your return and paid the balance of tax due by January 31, 1968, such balance shall be considered paid as of January 15, 1968.

65

FRANK FORMS CO

R. D. & R. GARNER
NAME

TAXABLE YEAR ENDED 12/31/67

SCHEDULE OF DEDUCTIONS

ICAL EXPENSES	FEDERAL	STATE
S AND MEDICINES	130 00	
1 % OF ADJ. GROSS	124 64	
T DRUGS AND MEDICINES	5 36	
DRS AND DENTISTS		
MCFARLANE O.D.	71 75	
OLDS DDS	138 00	
PEVALEY MD	91 50	
ROBINSON MD	43 00	
SMITH MD	30 00	
FAIRIE DENTAL X-RAY LAB	37 00	
ALS SAN ANTONIO	308 72	
ANCES		
S, NOT DEDUCTED BELOW	174 80	
FOR MED. TREATMENTS		
AID, GLASSES, ETC.		
MEDICAL EXPENSES	900 14	
NS. REIMBURSEMENTS	NONE NOT REIM'D	
3% (5) 3 ADJ. GROSS INCOME	900 14	
	373 92	
SUB. TOTAL	526 22	
S. - 1/2 PREM. (LMT. $150)	150 00	
DICAL DEDUCTIONS	676 22	676 22

TAXES	FEDERAL	STATE
PERSONAL PROPERTY TAX 33-10	23 00	23 00
REAL ESTATE TAX	441 56	441 56
STATE DISABILITY INSURANCE		
SALES TAX	139 00	139 00
STATE INCOME TAX	405 37	XXX XX
GASOLINE TAX Pers 16,000	60 00	60 00
TOTAL TAXES	1148 93	683 56

INTEREST (TO WHOM PAID)	FEDERAL AND STATE
EVANGWOOD CONST CO - ON HOME	941 25
1ST NAT'L BANK & TRUST	56 80
TOTAL INTEREST	998 05

IBUTIONS	FEDERAL AND STATE
S	100 00
RED CROSS $	
EALS $ MARCH OF DIMES $	75 00
COMMUNITY CHEST $	
$	
ONTRIBUTIONS - FEDERAL	175 00
L CONTRIBUTIONS	
NTRIBUTIONS - STATE	175 00

MISCELLANEOUS DEDUCTIONS	FEDERAL AND STATE
SAFE DEPOSIT BOX FEES	7 00
INCOME PROD. DUES AND SUBSCRIPTIONS	
INCOME TAX RETURN PREPARATION	25 00
ALIMONY (SCHEDULE ATTACHED)	
SPECIAL UNIFORMS AND LAUNDRY	
SMALL TOOLS	
CASUALTY LOSSES (SCHEDULE ATTACHED)	
TOTAL FEDERAL MISCELLANEOUS	32 00
AND TRAVEL EXPENSES (SCH. ATTACHED)	
TOTAL STATE MISCELLANEOUS	32 00
TOTAL DEDUCTION THIS SCHED. (STATE) ▶	2564 [illegible]
TOTAL DEDUCTION THIS SCHED. (FEDERAL) ▶	3030 [illegible]

D. 120
UCENT FORMS CO.

6

R.D.O.R. Gardner
NAME

TAXABLE YEAR ENDED 12/31/67

| | | |

SCHEDULE C-3 (Form 1040)
U.S. Treasury Department
Internal Revenue Service

Computation of Social Security Self-Employment Tax

Attach this schedule to your Income tax return, Form 1040
See Instructions on page 2

1967

▷ If you had wages, including tips, of $6,600 or more which were subject to social security taxes, do not fill in this page.
▶ Complete only one Schedule C-3; if you had more than one business, combine profits (or losses) from all of your businesses on this Schedule.
▷ Each self-employed person must file a separate schedule.

NAME AND ADDRESS (as shown on page 1 of Form 1040)
EDNA GARNER - 750 W. MAIN C.T. - UPLAND, CALIF.

NAME OF SELF EMPLOYED PERSON (as shown on social security card)
ROY D. GARNER

Social Security Number
561-30-2257

1	Net profit (or loss) shown in Schedule C (Form 1040), line 27 (Enter combined amount if more than one business)	< 12,944 41 >	
2	Add to net profit (or subtract from net loss) losses of business property shown in Schedule C, line 23		< 12,944 41 >
3	Total (or difference)		
4	Net income (or loss) from excluded services or sources included on line 3. Specify excluded services or sources		
5	Net earnings (or loss) from self-employment—		< 12,944 41 >
	(a) From business (line 3 less any amount on line 4)		
	(b) From partnerships, joint ventures, etc. (other than farming)		
	(c) From service as a minister, member of a religious order, or a Christian Science practitioner. Enter only if you have filed or are filing Form 2031		
	(d) From farming reported on line 2 (or line 3 if option used), separate Schedule F-1 (Form 1040)		
	(e) From service with a foreign government or international orgsnization		
6	Total net earnings (or loss) from self-employment reported on line 5. Enter here and in item F below (If line 6 is under $400, you are not subject to self-employment tax. Do not fill in rest of page.)		< 12,944 41 >
7	The largest amount of combined wages and self-employment earnings subject to social security tax is	$ 6,600 00	
8	(a) Total "F.I.C.A." wages as indicated on Form W-2		
	(b) Unreported tips, if any, subject to F.I.C.A. tax from Form 4137, line 9		
	(c) Total of lines 8(a) and 8(b). Enter here and in Item G below		
9	Balance (subtract line 8(c) from line 7)		
10	Self-employment income—line 6 or 9, whichever is smaller. Enter here and in item H, below		
11	Self-employment tax—If line 10 is $6,600, enter $422.40; if less, multiply the amount on line 10 by 6.4%. Enter this amount here and on page 1, line 15, Form 1040		

Do not detach — Schedule C-3 (Form 1040)

Important.—The amounts reported on the form below are for your social security account. This account is used in figuring any benefits, based on your earnings, payable to you, your dependents, and your survivors. Fill in each item accurately and completely.

SCHEDULE SE (Form 1040)
U.S. Treasury Department
Internal Revenue Service

U.S. Report of Self-Employment Income

For crediting to your social security account

1967

Indicate year covered by this return (even though income was received only in part of year):

A Calendar year 1967 [ ]; or other taxable year beginning ..... 1967, ending .....
If less than 12 months, was short year due to (a) [ ] Death, or (b) [ ] Change in accounting period, or (c) [ ] Other.

B BUSINESS ACTIVITIES SUBJECT TO SELF-EMPLOYMENT TAX (Grocery store, restaurant, etc.)

C BUSINESS ADDRESS (number and street, city or post office, State, ZIP code)

D SOCIAL SECURITY NUMBER OF PERSON NAMED IN ITEM E BELOW ▷

E PRINT OR TYPE NAME OF SELF EMPLOYED PERSON AS SHOWN ON SOCIAL SECURITY CARD

PRINT OR TYPE HOME ADDRESS (number and street or rural route)

(City or post office, State, and ZIP code)

PLEASE DO NOT WRITE IN THIS SPACE

F ENTER AMOUNT FROM LINE 6 $

G ENTER AMOUNT FROM LINE 8(c) IF ANY $

H ENTER AMOUNT

68

BEST COPY AVAILABLE

952121203078 -7

1040 U.S. Individual Income Tax Return

For the year January 1–December 31, 1966, or other taxable year beginning ..... 19..., ending ..... 19...

U.S. Treasury Department—Internal Revenue Service

1966

Please print or type

First name and initial (if joint return, use first names and middle initials of both)	Last name	Your social security number (Husband's, if joint return)
Roy D. & Romona	Garner	565 | 34 | 2357
Home address (Number and street or rural route) 754 West Azure Court		Your occupation Horseman
City, town or post office, and State Upland, California ZIP code 91786		Wife's number, if joint return 562 | 30 | 6316
A Enter the name and address used on your return for 1965 (if the same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1965 names and addresses. None		Wife's occupation Housewife
Your present employer and address Self		
Wife's present employer and address, if joint return		

Filing Status—check only one:

1a ☐ Single
1b ☒ Married filing joint return (even if only one had income)
1c ☐ Married filing separately. If your husband or wife is also filing a return give his or her first name and social security number.
1d ☐ Unmarried Head of Household
1e ☐ Surviving widow(er) with dependent child

Exemptions

	Regular	65 or over	Blind	
2a Yourself	☒	☐	☐	Enter number of exemptions checked ▶ 2
2b Wife	☒	☐	☐	

3a First names of your dependent children who lived with you Phyllis, John — Enter number ▶ 2

3b Number of other dependents (from page 2, Part I, line 3) — 0

4 Total exemptions claimed ▶ 4

Income	5	Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation ▶		
If joint return, include all income of both husband and wife	6	Other income (from page 2, Part II, line 8) ▶	22,000	00
	7	Total (add lines 5 and 6) ▶	22,000	00
	8	Adjustments (from page 2, Part III, line 5)		
	9	Total income (subtract line 8 from line 7) ▶	22,000	00
Figure tax by using either 10 or 11	10	Tax Table—If you do not itemize deductions and line 9 is less than $5,000, find your tax from tables in instructions. Do not use lines 11a, b, c, or d. Enter tax on line 12.		
Tax Computation	11	Tax Rate Schedule—		
	11a	If you itemize deductions, enter total from page 2, Part IV. If you do not itemize deductions, and line 9 is $5,000 or more enter the larger of: (1) 10 percent of line 9 or; (2) $200 ($100 if married and filing separate return) plus $100 for each exemption claimed on line 4, above. Deduction under (1) or (2) limited to $1,000 ($500 if married and filing separately). ▶	2,555	22
	11b	Subtract line 11a from line 9	19,444	23
	11c	Multiply total number of exemptions on line 4, above, by $600	2,400	00
	11d	Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12.	12,044	23
Tax Credits Payments	12	Tax (from either Tax Table, see line 10, or Tax Rate Schedule, see line 11) ▶	3,552	38
	13	Total credits (from page 2, Part V, line 5) ▶		
	14a	Income tax (subtract line 13 from line 12)	3,552	38
	14b	Tax from recomputing prior year investment credit (attach statement)		
	15	Self-employment tax (Schedule C-3 or F-1) ▶		
	16	Total tax (add lines 14a, 14b, and 15) ▶	3,552	38
	17	Total Federal income tax withheld (attach Forms W-2) ▶		
	18	1966 Estimated tax payments (include 1965 overpayment allowed as a credit) ▶ 1,704 09		
	19	Excess F.I.C.A. Tax Withheld (two or more employers—see page 5 of inst.) ▶		
	20	Nonhighway Federal gasoline tax—Form 4136, Reg. Inv.—Form 2439		
	21	Total (add lines 17, 18, 19, and 20) Exception #1 Form 2210	1,704	09
Tax Due or Refund	22	If payments (line 21) are less than tax (line 16), enter Balance Due. Pay in full with this return ▶	1,848	29
	23	If payments (line 21) are larger than tax (line 16), enter Overpayment ▶		
	24	Amount of line 23 you wish credited to 1967 Estimated Tax		
	25	Subtract line 24 from 23. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☐ Refund only		

Attach Check or Money Order here

Attach Copy 3 of Form W-2 here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here ▶ X Roy D. Garner Romona Garner

If joint return, BOTH HUSBAND AND WIFE MUST SIGN even if only one had income. Date

Sign here ▶ Gene Porter

Signature of preparer other than taxpayer. GENE PORTER CERTIFIED PUBLIC ACCOUNTANT Date 4-13-67

Address 1047 W. 6th Street

TRADE FORMS CO. 650—16—78361-9

64

PART I. Exemptions (Complete only for dependents claimed on line 3b, page 1)

(a) NAME (If more space is needed attach schedule)	(b) Relationship	(c) Number of months lived in your home. If born or died during year write "B" or "D"	(d) If 4 dependents and less income of $600 or more	(e) Amount you provided for dependent's support. If 100% write "ALL"	(f) Amount contributed by dependent including dependent's own income
1				$	$
2					
3 Total number of dependents listed above. Enter here and on page 1, line 3b . . . . . ▶▶					

PART II. Income from sources other than wages, etc.

1a Dividends and other distributions on stock (Name of payer—write (H), (W), (J), for stock held by husband, wife, or jointly) .....

Total line 1a . . . . . ▶▶

1b Exclusion (see instructions)

1c Capital gain distributions .

1d Nontaxable distributions .

1e Total lines 1b, 1c, and 1d . . . . .

1f Taxable dividends (line 1a less line 1e—not less than zero) . . . . . ▶▶

2 Interest (name of payer)

2a Earnings from savings and loan assoc., mutual savings banks, credit unions, etc. .....

Total line 2a

2b Interest on bank deposits (other than mutual savings) .....

Total line 2b

2c Other interest (bonds, etc.) .....

Total line 2c

2d Total interest income (lines 2a, 2b, & 2c) ▶▶

3 Pensions and annuities, rents and royalties, partnerships, estates or trusts, etc. (Sch. B)

4 Business income (Schedule C) . . . .

5 Sale or exchange of property (Schedule D).

6 Farm income (Schedule F) . . . . .

7 Miscellaneous income (state nature)
WAGERING INCOME (H)
22,000.00 — 22,000 00

Total line 7 ▶▶ — 22,000 00

8 TOTAL (add lines 1f through 7. Enter here and on page 1, line 6) . . . . ▶▶ — 22,000 00

PART III. Adjustments

1 "Sick pay" if included in line 5, page 1 (attach Form 2440 or other required statement) .

2 Moving expenses (attach Form 3903) . .

3 Employee business expense (attach Form 2106 or other statement) . . . . .

4 Payments by self-employed persons to retirement plans, etc. (attach Form [illegible])

PART IV. Itemized deductions—Use only if you do not use tax table or standard deduction.

Medical and dental expense (not compensated by insurance or otherwise)—Attach itemized list. If 65 or over see instructions.

1 Total cost of medicine and drugs . . .

2 Enter 1% of line 9, page 1 . . . . .

3 Subtract line 2 from line 1 . . . . .

4 Other medical, dental expenses (include hospital insurance premiums) . . . .

5 Total (add lines 3 and 4) . . . . . .

6 Enter 3% of line 9, page 1 . . . . . .

7 Subtract line 6 from line 5; see page 8 of instructions for maximum limitation ▶▶

Contributions.—Cash—including checks, money orders, etc. (itemize) .....

1 Total cash contributions . . . . . .

2 Other than cash (see instructions for required statement). Enter total of such items here.

3 Carryover from prior years (see page 8 of instr.).

4 Total contributions (add lines 1, 2, and 3—see instructions for limitation) . . ▶▶ — 1750 00

Taxes.—Real estate . . . . . .

State and local gasoline . . . . . .

General sales (see page 15 of instructions) .

State and local income . . . . . .

Personal property . . . . . .

SCH #1 ATTACHED Total taxes ▶▶ — 8875

Interest expense.—Home Mortgage . . .

Other (itemize) .....

SCH #1 ATTACHED

Total interest expense ▶▶ — 14490

Miscellaneous deductions.—(see page 9 of instructions) .....

SCH #1 ATTACHED

Total Miscellaneous ▶▶ — 3200

TOTAL DEDUCTIONS (for page 1, line 11a) ▶ — 25565 00

PART V. Credits

1 Retirement income credit (Schedule R) .

2 [illegible]

10

NAME R.D. & R. GARNER

TAXABLE YEAR ENDED 12/31/66

SCHEDULE OF DEDUCTIONS

MEDICAL EXPENSES	FEDERAL	STATE
DRUGS AND MEDICINES		
LESS % OF ADJ. GROSS		
NET DRUGS AND MEDICINES		
DOCTORS AND DENTISTS		
NURSES		
HOSPITALS		
AMBULANCES		
HEALTH AND ACCIDENT INS.		
TRAVEL FOR MED. TREATMENT		
HEARING AID, GLASSES, ETC.		
TOTAL MEDICAL EXPENSES		
LESS - INS. REIMBURSEMENTS		
% (F) % (S) ADJ. GROSS INCOME		
NET MEDICAL DEDUCTIONS		

TAXES	FEDERAL	STATE
AUTO	XXX XX	
PERSONAL PROPERTY TAX 40-18	122 00	122 00
REAL ESTATE TAX	429 19	429 19
STATE DISABILITY INSURANCE		
SALES TAX		
STATE INCOME TAX	225 00	225 00
TRANSPORTATION TAX	15 36	XXX XX
TELEPHONE AND TEL. TAX	XXX XX	
AMUSEMENT TAX	XXX XX	
GASOLINE TAX	XXX XX	
	72 00	48 00
TOTAL TAXES	863 55	824 19

INTEREST (TO WHOM PAID)	FEDERAL AND STATE
SUNSET MANOR CO - ON HOME	965 83
FIRST NAT'L BANK & TRUST	493 19
TOTAL INTEREST	1459 02

CONTRIBUTIONS	FEDERAL AND STATE
CHURCHES	100 00
SALV. ARMY $ / RED CROSS $	
MAS AND WATERSEALS $ / MARCH OF DIMES $	
CANCER $ / COMMUNITY CHEST $	75 00
UNITED CRUSADE $	
TOTAL CONTRIBUTIONS - FEDERAL	175 00
POLITICAL CONTRIBUTIONS	
TOTAL CONTRIBUTIONS - STATE	175 00

MISCELLANEOUS DEDUCTIONS	FEDERAL AND STATE
SAFE DEPOSIT BOX FEES	7 00
INCOME PROD. DUES AND SUBSCRIPTIONS	
INCOME TAX RETURN PREPARATION	25 00
ALIMONY (SCHEDULE ATTACHED)	
SPECIAL UNIFORMS AND LAUNDRY	
SMALL TOOLS	
CASUALTY LOSSES (SCHEDULE ATTACHED)	
TOTAL FEDERAL MISCELLANEOUS	32 00
ADD TRAVEL EXPENSES (SCH. ATTACHED)	
TOTAL STATE MISCELLANEOUS	32 00
TOTAL DEDUCTION THIS SCHED. (STATE)	2540 21
TOTAL DEDUCTION THIS SCHED. (FEDERAL)	

71

BEST COPY AVAILABLE

252106347

Form 1040 U.S. Individual Income Tax Return 1965

for the year January 1 December 31, 1965 or other taxable year beginning ..... , 1965, ending ..... , 19 — US Treasury Department—Internal Revenue Service

▼ First name and initial (If joint return, use first names and middle initials of both) | Last name | Your social security number (Husband's if joint return)

ROY D. & ROWENA | GARNER | 565 34 2357

Home address (Number and street or rural route)

754 W. AZURE CT.

City, town or post office, and State | Postal ZIP code

UPLAND, CALIFORNIA

Your occupation & present employer

PROF. GAMBLER
SELF

Wife's number, if joint return

262 30 6316

Wife's occupation & present employer

HOUSEWIFE

Enter the name and address used on your return for 19[illegible] (if the same as above, write "Same"). If none filed, give reason. If changing from separate to joint or joint to separate returns, enter 1964 names and addresses.

SAME

▲ Attach Copy B of Form W-2 here

Filing Status —check one:

1a ☐ Single

1b ☒ Married filing joint return (even if only one had income)

1c ☐ Married filing separately. If your husband or wife is also filing a return give his or her first name and social security number.

1d ☐ Unmarried Head of Household

1e ☐ Surviving widow (er) with dependent child

Exemptions

	Regular	65 or over	Blind	
2a Yourself	☒	☐	☐	Enter number of exemptions checked ▶▶▶ 2
2b Wife	☒	☐	☐	

3a First names of your dependent children who lived with you. PHYLLIS, JOHN — Enter number ▶▶▶ 2

3b Number of other dependents (from page 2 Part I, line 3) —

4 Total exemptions claimed ▶▶▶ 4

Income If joint return, include all income of both husband and wife	5	Wages, salaries, tips, etc. If not shown on attached Forms W-2 attach explanation ▶	164 60
	6	Other income (from page 2, Part II, line 9) ▶	8022 00
	7	Total (add lines 5 and 6) ▶	8,206 60
	8	Adjustments (from page 2, Part III, line 5) ▶	
	9	Total income (subtract line 8 from line 7) ▶	8,206 60

▲ Please print or type

Figure tax by using either 10 or 11

Tax Computation	10	Tax Table—If you do not itemize deductions and line 9 is less than $5,000, find your tax from tables in instructions. Do not use lines 11 a, b, c, or d. Enter tax on line 12.	
	11	Tax Rate Schedule—	
	11a	If you itemize deductions, enter total from page 2, Part IV If you do not itemize deductions, and line 9 is $5,000 or more enter the larger of: (1) 10 percent of line 9 or; (2) $200 ($100 if married and filing separate return) plus $100 for each exemption claimed on line 4, above. The deduction computed under (1) or (2) is limited to $1,000 ($500 if married and filing separate return). ▶	2,683 58
	11b	Subtract line 11a from line 9	5,523 02
	11c	Multiply total number of exemptions on line 4, above, by $600	2,400 00
	11d	Subtract line 11c from line 11b. Enter balance on this line. (Figure your tax on this amount by using tax rate schedule on page 11 of instructions.) Enter tax on line 12.	3,123 02
Tax Credits Payments	12	Tax (from either Tax Table, see line 10, or Tax Rate Schedule, see line 11) ▶	470 91
	13	Total credits (from page 2, Part V, line 5) ▶	
	14	Income tax (subtract line 13 from line 12)	470 91
	15	Self-employment tax (Schedule C-3 or F-1) ▶	
	16	Total tax (add lines 14 and 15) ▶	470 91
If either you or your wife worked for more than one employer see page 5 of instructions	17a	Total Federal income tax withheld (attach Forms W-2) ▶	
	17b	1965 Estimated tax payments LOS ANGELES, CALIF. ▶ 2,175 00 (Include 1964 overpayment allowed as a credit) (Office where paid)	
	17c	Total (add lines 17a and 17b)	2,175 00
Tax Due or Refund	18	If payments (line 17c) are less than tax (line 16), enter Balance Due. Pay in full with this return ▶	
	19	If payments (line 17c) are larger than tax (line 16) enter Overpayment ▶▶▶	1,704 09
	20	Amount of line 19 you wish credited to 1966 Estimated Tax	1,704 09
	21	Subtract line 20 from 19. Apply to: ☐ U.S. Savings Bonds, with excess refunded or ☐ Refund only	

▲ Attach Check or Money Order here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. If prepared by a person other than taxpayer, his declaration is based on all information of which he has any knowledge.

Sign here ▶ X Roy D. Garner X Rowena Garner Date 1/15/66

If joint return, BOTH HUSBAND AND WIFE MUST SIGN even if only one had income.

Sign here ▶ Paul Goldberg Date 3/6/66

Signature of preparer other than taxpayer

GENE PORTER
ACCREDITED PUBLIC ACCOUNTANT
1047 W. 6th Street
ONTARIO, CALIFORNIA

[illegible] 1965 FORM 1040 (1)

Exemptions Complete only for dependents claimed on line 3b, page 1

(a) NAME (If more space is needed attach schedule)	(b) Relationship	(c) Months lived in your home. If born or died during year write "B" or "D"	(d) Did dependent have income of $1,000 or more?	(e) Amount YOU provided for dependent's support, if 100% write "ALL"	(f) Amount provided by Other(s) including dependent
1				$	$
2					

3 Total number of dependents listed above. Enter here and on page 1, line 3b ▶▶▶▶

PART II. Income from all sources other than wages, salaries, etc.

Dividends and Other Distributions

A Gross amount		
B Nontaxable and capital gain distributions		
C Subtract item B from item A (See Schedule B if over $400)		

Explanation of C (Include information for stock held by husband, wife or jointly)

1a Qualifying dividends (name of payer)

Total qualifying

1b Subtract $100. If joint return see instructions

1c Balance (but not less than zero)

1d Nonqualifying dividends (name of payer)

Total nonqualifying

2 Total dividends (add lines 1c and 1d) ▶▶▶▶

3 Interest (name of payer)

Total interest income ▶▶▶▶

4 Pensions and annuities, rents and royalties, partnerships, & estates or trusts (Schedule E)

5 Business income (Schedule C)

6 Sale or exchange of property (Schedule D)

7 Farm income (Schedule F)

8 Other sources (state nature)

GAMBLING 8,022.00

Total other sources ▶▶▶▶ 8,022.00

9 Add lines 2 through 8. Enter here and on page 1 line 6. ▶▶▶▶ 8,022.00

PART III. Adjustments

1 "Sick pay" if included in line 5, page 1 (attach Form 2440 or other required statement)

2 Moving expenses (attach Form 3903)

3 Employee business expense (attach Form 2106 or other statement)

4 Payments by self employed persons to retirement plans, etc. (attach Form 2950SE)

5 Total adjustments (lines 1 through 4). Enter here and on page 1, line 8

EXPENSE ACCOUNT INFORMATION—If you had an expense allowance or charged expenses to your employer, check here ☐ and see page 7 of instructions.

PART IV. Itemized deductions (Use only if you do not use tax table or standard deduction.

Medical and dental expense.—Attach itemized list. Do not enter any expense compensated by insurance or otherwise. NOTE: If you or your wife are 65 or over, or if other than dependent parent 65 or over, see page 8 of instructions for possible larger deduction:

1 Enter excess, if any, of medicine and drugs over 1% of line 9, page 1 (see page 8 of instructions)

2 Other medical, dental expenses (include hospital insurance premiums)

3 Total (add lines 1 and 2)

4 Enter 3% of line 9, page 1 (see page 8 of instructions) SCH #1 ATTACHED

5 Subtract line 4 from line 3, see page 8 of instructions for maximum limitation ▶ 391 53

Contributions.—Cash—including checks, money orders, etc. (itemize)

1 Total cash contributions

2 Other than cash (see instructions for required statement) Enter total of such items here SCH #1 ATTACHED

3 Total contributions (add lines 1 and 2—see instructions for limitations) ▶▶▶▶ 3000

Taxes.—Real estate $

State and local gasoline $

General sales $

State and local income $

Personal property $

SCH #1 ATTACHED Total taxes ▶▶▶▶ 1,115 48

Interest expense.—Home mortgage $

Other (itemize)

SCH #1 ATTACHED

Total interest expense ▶▶▶▶ 1,107 72

Other deductions.—(see page 9 of instructions)

SCH #1 ATTACHED

Total other deductions ▶▶▶▶ 3685

TOTAL DEDUCTIONS (for page 1, line 11a) ▶ 2,683 58

PART V. Credits

1 Retirement income credit (Schedule R)

2 Investment credit (Form 3468)

3 Foreign tax credit (Form 1116)

4 Tax-free covenant bonds credit

5 Total credits (add lines 1 through 4). Enter here and on page 1, line 13

☆ U.S. GOVERNMENT PRINTING OFFICE: 1985-O-771-930

CALENDAR YEAR 19 65

ADDRESS _____ SOC. SEC. NO. _____

DEDUCTION SCHEDULE

MEDICAL [ ] OVER 65	FEDERAL	STATE
DRUGS	100 00	
LESS 1% A.G.I.	X2 27	
BALANCE	17 73	
DR. Rayneiy MD	15 00	
DR. [illegible] DDS	20 00	
DR. Sendit MD	42 50	
DR. Cavonaugh MD	48 00	
DR.		
DR.		
DR.		
DR.		
DR.		
LAXATORIES	27 00	
TRAVEL FOR MED. 5¢	10 20	
HEALTH & ACCIDENT INS.	243 50	
GLASSES	213 50	
MEDICAL EXPENSES	634 73	
LESS REIMBURSED BY INS.	ABOVE NOT RECD	
	634 73	
LESS 3% ADJ. GROSS INC.	240 20	
TOTAL MEDICAL DED.	394 53	371 53

TAXES	FEDERAL	STATE
REAL ESTATE	405 97	405 97
STATE & LOCAL GASOLINE 500×7.4¢	37 00	37 00
GENERAL SALES	92 00	92 00
STATE & LOCAL INCOME	232 51	XXXX
PERSONAL PROPERTY		
PERSONAL PROPERTY AUTO 96-16	80 00	80 00
STATE-AUTO	268 00	268 00
TOTAL TAXES	1115 97	882 97

INTEREST (TO WHOM PAID)		
MORTGAGE		
SUNSET MANOR Co.	987 22	
INSTALLMENT LOANS		
1ST NAT'L BANK OF CYCLO	121 50	
DEPARTMENT STORES		
TOTAL INTEREST	1108 72	1108 72

CONTRIBUTIONS

CHURCHES		
PARTNERSHIP SHARE		
GIRL BOY SCOUTS		
COMMUNITY CHEST / UNITED FUND		
RELIEF FUND	30 00	
RED CROSS		
XMAS & EASTER SEALS		
MARCH OF DIMES		
CANCER FUND		
MISC. ORGANIZED CHARITIES		
POLITICAL CONTRIBUTIONS	XXXXX	
OTHER THAN CASH		
TOTAL CONTRIBUTIONS	30 00	30 00

OTHER DEDUCTIONS

UNION / PROFESSIONAL DUES		
SMALL TOOLS AND SUPPLIES		
UNIFORMS / PROTEC. CLOTHING		
LAUNDRY AND CLEANING		
AUTO USE		
INCOME TAX PREPARATION	35 00	
CHILD CARE (SCHEDULE)		
ALIMONY (SCHEDULE)		
INVESTMENT COUNSEL & PUBS (SCHEDULE)		
STATE DISABILITY INS.	1 85	
TOTAL OTHER DED	36 85	36 85

CASUALTY LOSS / EXPLANATION

TOTAL LOSS		
LESS INSURANCE REIMBURSEMENTS		
LESS EXCLUSIONS		
TOTAL		
	FEDERAL	STATE
TOTAL DEDUCTIONS	2,603 31	2,[illegible]

Supreme Court, U. S.
FILED
JAN 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-100

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
SIDNEY M. GLAZER,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:	
California v. *Byers*, 402 U.S. 424	5
Chapman v. *California*, 386 U.S. 18	8
Grimes v. *United States*, 379 F. 2d 791, certiorari denied, 389 U.S. 846	8
Harrington v. *California*, 395 U.S. 250	8
Milton v. *Wainwright*, 407 U.S. 371	8
Pauldino v. *United States*, 500 F. 2d 1369	5, 8
Shapiro v. *United States*, 335 U.S. 1	5
United States v. *Covello*, 410 F. 2d 536, certiorari denied, 396 U.S. 879	9
United States v. *Kordel*, 397 U.S. 1	8
United States v. *Silverman*, 449 F. 2d 1341, certiorari denied, 405 U.S. 918	5
United States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103	8
Statutes involved:	
18 U.S.C. 224	2
18 U.S.C. 371	2
18 U.S.C. 1084	2
18 U.S.C. 1952	2
18 U.S.C. 4208(a)(2)	3
47 U.S.C. 605	9
Miscellaneous:	
S. 3982 and H.R. 16602, introduced September 11, 1974, 120 Cong. Rec. S. 16306 and H. 9183 (daily ed., September 11, 1974)	8

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-100

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals panel (App., *infra*) [1] and the opinion of the court of appeals *en banc* (Pet. App. A) are reported at 501 F. 2d 228.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on April 11, 1974. A petition for rehearing was denied on June 11, 1974. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to August 9, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] "App." refers to the appendix to this brief.

QUESTIONS PRESENTED

1. Whether the admission into evidence of petitioner's federal income tax returns at his trial for non-tax-related gambling offenses violated petitioner's privilege against self-incrimination, although he did not assert any privilege when he filed the returns.

2. Whether errors were committed regarding the admission of evidence and whether the government should have been estopped to call as a witness one of petitioner's co-conspirators.

STATEMENT

After a jury trial[2] in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to violate 18 U.S.C. 224 (bribery in sporting contests), 1084 (interstate transmission of bets or wagers), and 1952 (use of an interstate facility to distribute proceeds of unlawful activity), in violation of 18 U.S.C. 371.[3] Petitioner was sentenced to two years' imprisonment, subject to the

[2] This was petitioner's second trial. At the first trial, petitioner and co-defendant Clarence Swank were convicted of conspiracy; Swank was also convicted of transmitting wagers in interstate commerce in violation of 18 U.S.C. 1084, but the jury was unable to reach a verdict on the charge that petitioner aided and abetted that offense. Co-defendant Wayne Donaway was convicted of violations of 18 U.S.C. 1084 and 1952. The trial court set aside petitioner's conviction and granted him a new trial on the ground that the prosecutor had improperly commented on petitioner's failure to testify.

[3] Petitioner was also retried (Count Two) for aiding and abetting Clarence Swank in the interstate transmission of bets and wagers, but, at the close of the government's case, petitioner was acquitted by the court on that charge.

immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2).[4] On appeal, a panel of the court of appeals reversed the conviction, one judge dissenting (App., *infra*). Following a rehearing *en banc*,[5] the court affirmed the conviction, five judges dissenting (Pet. App. A).

The facts are undisputed. The jury convicted petitioner on the first count of the indictment, which charged that petitioner, Clarence Swank, William Lawler (an unindicted co-conspirator), and others conspired to violate the above-mentioned gambling laws. The object of the conspiracy, as charged in the indictment (Clerk's Record 183–184), was as follows:

> [D]efendants and their unindicted co-conspirators would arrange to fix horse races, by means of bribery, injecting stimulants in horses, and

[4] After the second conviction, petitioner was released on bond pending appeal. Thereafter, bond was revoked after petitioner was found in possession of a suitcase containing paraphernalia and drugs of a type used to stimulate and depress race horses. The court of appeals affirmed the bond revocation, and this Court denied certiorari to review that action, 416 U.S. 935, after the government indicated that it would not move for petitioner's confinement unless and until the court *en banc* affirmed the conviction. Although the conviction has now been affirmed, the government so far has not sought petitioner's confinement, and he remains free on bond.

[5] On September 11, 1972, an order was filed denying the government's petition for rehearing and rejecting the suggestion for rehearing *en banc*, stating that no judge had requested a vote. In fact, however, one judge had requested a vote. When this error was called to the clerk's attention, the mandate was withheld pending the vote, and on December 13, 1972, a majority granted rehearing *en banc*. Petitioner sought a writ of mandamus or prohibition from this Court to prevent the rehearing, but the application was denied, 411 U.S. 963.

> other means, and would secure information regarding particular horses and jockeys from sources unavailable to the general public. Based upon these arrangements and this information, defendants would attempt to place and [would] place wagers on particular horses. In order to maintain high pari-mutual odds, and in order to avoid others not a party to the conspiracy placing wagers on the same horses, wagers were placed with bookmakers, away from the track, shortly before the starting time of the race in which the particular horse was running.

Petitioner's role in the conspiracy was to supply information to co-conspirators Lawler and Swank, who would place bets on the selected horses. The indictment did not charge, and the government did not attempt to prove, that petitioner himself had placed any bets on any of the races involved in the conspiracy.

The evidence adduced against petitioner included the testimony of co-conspirators Lawler and Swank and that of Emory Long, trainer of one of the horses on which Lawler and Swank bet pursuant to the conspiracy. In addition, the government introduced charts of various horses, indicating the name of the horse, the dates and results of his races, and the names of the owner, trainer, or jockey involved; telephone toll records, which revealed in detail the workings of the betting arrangements; and petitioner's federal income tax returns for the years 1965 through 1967, on which

petitioner had reported gambling as the source of most of his income.[6]

ARGUMENT

1. a. We rely on the opinion of the court of appeals *en banc* (Pet. App. A 1–9) to support our position that the admission of the tax returns did not violate petitioner's privilege against self-incrimination because petitioner did not claim the privilege when he filed the returns.[7] The court stated, in pertinent part (Pet. App. A 7–9):

> The questions asked on the tax return were completely neutral; only Garner knew a response might be incriminating. As to all taxpayers in general, there was "compulsion" to provide the government with the information ~~cally, there was "compulsion" *to incriminate.* it was entitled to~~ demand. As to Garner specifi- But because Garner knew his answers might be incriminating, he had a choice either of claim-

[6] This evidence consisted of petitioner's federal income tax returns, Form 1040, on which he had indicated the following: on the 1965 return, petitioner listed his occupation as being that of a "professional gambler," declaring $8,022 as miscellaneous income derived from "gambling"; on the 1966 return, petitioner declared $22,000 as "wagering" income; and on the 1967 return, he declared $25,400 as "wagering" income. (See Clerk's Record 67).

[7] We do not address here the question whether the result reached by the court of appeals might alternatively be supported on the ground that federal income tax returns are required records to which the privilege against self-incrimination does not attach at all, either at the time of filing or at a subsequent criminal trial. See *Pauldino* v. *United States*, 500 F. 2d 1369, 1370–1371 (C.A. 10). Cf. *California* v. *Byers*, 402 U.S. 424; *Shapiro* v. *United States*, 335 U.S. 1; *United States* v. *Silverman*, 449 F. 2d 1341, 1345–1346 (C.A. 2), certiorari denied, 405 U.S. 918.

ing his privilege or declining to do so and answering the questions. Had Garner chosen to claim his privilege on the tax return, the government would ultimately have had to decide whether it was willing to grant him immunity in order to obtain the answer [footnote omitted]. But the granting of immunity must be in the hands of the government, not in the hands of taxpayers who provide incriminating answers rather than assert their privilege [footnote omitted].

Accepting appellant's contention would provide us with an unpalatable result. We have held that a taxpayer must assert his privilege against self-incrimination in his return in response to a specific question. Just as he had no right to be immune from questioning, likewise he is not free to immunize himself from prosecution by volunteering information to the government. To hold otherwise would allow any witness in any proceeding the later protection of the Fifth Amendment to frustrate the use of information derived from earlier testimony when the witness failed to invoke his privilege. If this were the law, immunity from use of incriminating information might well be achieved without government approval by merely including it in a tax return. Such a decision would "embark us on uncharted and treacherous seas." *Byers, supra,* 402 U.S. at 458 (Harlan, J., concurring).[8]

[8] (Footnote in original renumbered.) If Congress feels that this decision might jeopardize revenue collection, it might provide use immunity for information contained in tax returns. However, we do not feel that a judicial decision is the appropriate method for altering the compex and interrelated tax

An equally disquieting result of an acceptance of appellant's contention would be the difficulty in defining the outer perimeters. If a privilege can be asserted at a later date for information contained in a tax return, could not every subpoenaed witness in court make the same claim? Would not every response to an inquiry, originating at any level of government from census taker to property tax questioner, repose a right in the respondent to later shield those answers? This "would be an extreme if not an extravagant application of the Fifth Amendment * * *." *Sullivan, supra,* at 263–64.

We have stated that Garner failed to assert his privilege. Others might construe this as an implied waiver of its protection. That characterization overlooks the fact that the Fifth Amendment does not automatically cloak our every utterance in the fabric of its rubric. We must invoke and assert its benefits. "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States,* 409 U.S. 322, 328 (1973). Essentially, the question is whether in this situation the Fifth Amendment is a right which can be invoked retrospectively or whether it is a privilege which must be claimed when the incriminating information is requested. Here, we hold

systems of this country. *See* Byers, *supra*, 402 U.S. at 442–43 (Harlan, J., concurring); Marchetti, *supra*, 390 U.S. at 59–60; 86 Harv. L. Rev. 914, 919 n. 25 (1973). [Therefore, petitioner's concern (Pet. 17) that this decision will hinder the collection of taxes is addressed to the wrong branch of government.]

> it to be a privilege which Garner should have asserted in his tax return. Having failed to do so, he may not claim its benefit during his trial. [Emphasis in original.]

Apart from the superseded decision of the original panel below, there is no judicial authority supporting petitioner's contention. Other courts that have considered the claim have agreed with the result of the *en banc* majority. See *Pauldino* v. *United States,* 500 F. 2d 1369, 1370–1371 (C.A. 10); *Grimes* v. *United States,* 379 F. 2d 791, 796 (C.A. 5), certiorari denied, 389 U.S. 846; see also *United States* v. *Kordel,* 397 U.S. 1, 10; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 113.

b. In any event, we submit that the present case is not an appropriate vehicle for deciding the issue because any error involved in the use of the tax returns would have been harmless beyond a reasonable doubt. *Milton* v. *Wainwright,* 407 U.S. 371; *Harrington* v. *California,* 395 U.S. 250; *Chapman* v. *California,* 386 U.S. 18. As Judge Wallace pointed out in his dissent from the original panel opinion (see App., *infra,* p. 8A) "ample evidence other than the tax returns to demonstrate [petitioner's] gambling proclivities [was] provided by co-conspirators William Lawler and Clarence Swank and witness Emory Long."

c. Resolution of the issue now by this Court would be inappropriate for the further reason that there is pending in Congress legislation dealing with the use of tax returns in criminal prosecutions. See, *e.g.,* S. 3982 and H.R. 16602, each introduced September 11,

1974, 120 Cong. Rec. S16306, H9183 (daily ed., September 11, 1974) (providing for access to tax returns solely for purposes of administration of the Internal Revenue laws). Thus, Congressional action may resolve many of these issues or, at least, aid the Court's eventual consideration of them.

2. Petitioner raises and discusses summarily (Pet. 3–4, 18–19) three contentions that the court of appeals panel rejected without discussion.

The introduction of telephone toll records into evidence is not prohibited by 47 U.S.C. 605. See *United States* v. *Covello,* 410 F. 2d 536, 541–542 (C.A. 2), certiorari denied, 396 U.S. 879. Moreover, the first clause of the statute permits disclosure of both the existence and the contents of a wire communication "in response to a subpoena issued by a court of competent jurisdiction * * *." Here the telephone records were obtained pursuant to subpoena.[9]

The Daily Racing Form was properly admitted to prove the races had been run. Leonard Foote, chief law enforcement officer for the California Racing Board, testified that the Daily Racing Form is the official chart book for the Racing Board and is kept in the normal course of business by the Racing Board (Transcript of Trial 256, 262).

Finally, petitioner contends that the government was estopped to call co-conspirator Swank as a witness because it opposed the severance of Swank at the

---

[9] The attorney who tried the case for the government has informed us that the telephone records were obtained pursuant to subpoena for use before the grand jury which indicted petitioner and they were retained for use during trial.

466-634 O - 75 - 2

first trial and thus made him unavailable as a witness at that time. Petitioner does not allege that the prosecution acted in bad faith in opposing the motion for a severance, and there was no inconsistency between that action and calling Swank as a witness in the second trial. Moreover, petitioner does not explain how Swank would have exculpated him at the first trial although he failed to do so at the second trial. These issues are discussed in greater detail in our brief in the court of appeals, pages 17–30, 33–35, and 41, respectively.[10]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
SIDNEY M. GLAZER,
MARC PHILIP RICHMAN,
Attorneys.

JANUARY 1975.

[10] Petitioner raises but does not discuss four other issues (Pet. 3–4). These were rejected without discussion by the panel of the court of appeals, and are discussed in our court of appeals brief at pages 42–48, 49–51, 52–55, and 55–58, respectively. A copy of that brief is being lodged with the Clerk of this Court.

RECEIVED
JUN 5 1972
U. S. ATTORNEY
LOS ANGELES, CALIF.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY D. GARNER,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.
No

[June 5, 1972]

Appeal from the United States District Court for the Central District of California

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and WALLACE,* District Judge.

KOELSCH, Circuit Judge.

Appellant Garner appeals from the judgment convicting him of conspiring to violate federal gambling statutes.

To prove that appellant was engaged in the "business of betting and wagering," an essential element of the conspiracy as charged, the Government offered into evidence appellant's federal income tax returns for the years 1965 through 1967, on which appellant had reported gambling as the source of most of his income. The returns were admitted over appellant's objection.

In 1927, the Supreme Court held in *United States v. Sullivan*, 274 U.S. 259 (1927), that a person could not refuse to file a federal income tax return on the ground that certain disclosures in the return would tend to incriminate him. The Court, per Mr. Justice Holmes, said: "It would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had

*Honorable J. Clifford Wallace, United States District Judge, San Diego, California, sitting by designation.

been made in crime." 274 U.S. at 263-264. The Court did suggest that a taxpayer might refuse to answer certain questions on the return which might incriminate him, but that he could not refuse to file any return at all, because, "[m]ost of the items [on the return] warranted no complaint." 274 U.S. at 263.

What *Sullivan* left open, and what no Supreme Court case has yet decided, is this question: to what extent and under what circumstances may incriminating information supplied by a taxpayer in an income tax return be used against the taxpayer in a criminal prosecution unrelated to the income tax laws?

First, it must be pointed out that recent Supreme Court decisions dealing with the right of persons to refuse to file reports with the Government, when such reports would have the "direct and unmistakable consequence of incriminating [the person reporting] . . ." [*Marchetti v. United States*, 390 U.S. 39, 49 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Leary v. United States*, 395 U.S. 6 (1969); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 1965)], do not apply to the requirement of filing income tax returns. Those cases dealt with statutes which were designed to elicit information about specific activities from a specific group of individuals who were "inherently suspect of criminal activities," *Albertson, supra*, 382 U.S. at 79, such as possessors of unlawful firearms, persons engaged in unlawful wagering activities, communists, and persons dealing in certain unlawful drugs. In each case, the activity required to be reported was "an area permeated with criminal statutes," *Marchetti, supra*, 390 U.S. at 47. Each case distinguished, and asserted the continuing vitality of, *Sullivan, supra*, on the ground that the questions on an income tax return are not inherently directed at the detection of criminal activity, but are instead directed at the general public and are "neutral on their face." *Albertson, supra*, 382 U.S. at 79; *Grosso, supra*, 390 U.S. at 73 (Brennan, J. concurring). See *California v. Byers*, 402 U.S. 424, 431 (1971).

However, this does not end the inquiry. It is merely the point of departure, for appellant in this case did not refuse to file an income tax return. Rather, he filed his returns as required by the Internal Revenue Code and, as far as the record shows, disclosed accurately both the amount and source of all his taxable income

for the years involved. He revealed the principal source of such income—gambling. This disclosure, the Government insists, may be used to prove an essential element of violation of the federal gambling laws.

The Government relies upon this court's decision in *Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949) for the proposition that income tax returns may be used as evidence in non-tax-related criminal proceedings. In that case we rejected the Fifth Amendment objections of the defendant, who was charged with violations of the wartime Emergency Price Control Act, and whose income tax returns were admitted to prove the amounts of income defendant unlawfully earned; relying solely[1] on the reasoning of the Fifth Circuit in *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), cert. denied, 313 U.S. 574, reh. denied, 314 U.S. 706, we said:

> "The income tax returns were voluntarily executed by appellants under oath. They were not made in compliance with a subpoena or court order, nor were they made under the threat of prosecution or induced by any from of compulsion save that reflected in the duty of every person to report all forms of taxable income in the manner prescribed by our Internal Revenue Laws.
>
> If appellants believed that certain declarations in their tax returns might incriminate them they could have refrained from making the voluntary tax declarations here in evidence. However, they chose to report the illicit income rather than risk possible prosecution for making false or incomplete returns covering such income. The disclosures upon the tax returns must therefore be deemed to have been voluntarily entered upon a public record." 177 F.2d at 617-618.[2]

---

[1]We noted a number of opinions in which appellate courts had approved the admission of such evidence, but acknowledged that in none was there "any discussion by the courts regarding the constitutional privilege." 177 F.2d at 617.

[2]In Grimes v. United States, 379 F.2d 791 (5th Cir. 1967) cert. denied, 389 U.S. 846, the Fifth Circuit continued to follow this approach. The court there said: "Assuming, without deciding, that the law required Grimes to truthfully state his occupation on the [tax] return, that a false statement would subject him to criminal penalty, and that he was thus

The passage quoted above makes it clear that in *Stillman* we applied a concept of "implied waiver" to the defendant's disclosure of self-incriminatory information on his income tax return. But, in view of recent constitutional developments, this concept has no place where the issue involves the assertion of a constitutional right and, consequently, we believe that the Supreme Court has eliminated the doctrinal keystone of the *Stillman* decision. *Marchetti v. United States*, 390 U.S. 39, 51 (1968).

All the decisions involving the question of compelled disclosures to government since *Sullivan* have consistently noted that there does exist a constitutional privilege to object to the disclosure of information which is self-incriminatory. In *California v. Byers, supra*, Mr. Justice Harlan carefully distinguished between requiring a person to report information crucial to fulfilling the "noncriminal governmental purpose of securing the information . . ." 402 U.S. at 458 (Harlan, J., concurring), and information from which criminal behavior could or would be proved: "I do not minimize the aid given the State of California by virtue of the requirement to stop and identify oneself [at an automobile accident]. But this requirement is essential to the State's nonprosecutorial goal; and, the stop having been once coerced, virtually all information secured after the stop is likely to be tainted for the purposes of exclusion under the Fifth Amendment in any subsequent prosecution." 402 U.S. at 458, n. 10 (Harlan, J., concurring). In *Byers* the issue was whether a report of an accident must be made at all, not whether individual responses in a report, if filed, could be used as criminal evidence.

forced to report as he did, he nevertheless had the right to claim self-incrimination at that time. Not claiming it then, his statement amounted to a voluntary admission which we hold could be used in this [gambling] prosecution." 379 F.2d at 796. Cf. U.S. v. Zizzo, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915, reh. denied, 384 U.S. 982, relied upon by the Grimes court. *Zizzo* relied on the Supreme Court's statement in Lewis v. United States, 348 U.S. 419, 422 (1955) that: "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the [wagering] tax and make the disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and consequently, there is nothing violative of the Fifth Amendment." In *Marchetti, supra*, the Court overruled Lewis on this point, leaving *Grimes* and *Zizzo* as dubious authority on the waiver question.

While it is true that the California court in *Byers* had held that such reports could be required only if a use restriction were put on the information contained therein, the Supreme Court's reversal of the California court was on the basic question of whether the filing of *any* such report would be self-incriminating. The California court held that filing alone was incriminating under the *Marchetti* line of cases; the Supreme Court held that it was not, because the primary purpose of requiring the report was not to collect information about inherently criminal behavior. However, under this analysis, the question of the use of compelled disclosures in unrelated criminal proceedings was not at issue. Neither was the question of whether a criminal prosecution could be based upon a refusal, unaccompanied by a claim of privilege, to give inculpatory information.[3]

It is our opinion, then, that the admissibility of appellant's disclosures here must be determined by an examination of the context in which they were made. First is the question of whether the disclosures were compelled. We are clear that the answer is yes. 26 U.S.C. §7203 makes it a crime to fail to file any return, pay any tax, or supply any information. 26 U.S.C. §7206 likewise makes it a crime for a person to make and subscribe any return "which he does not believe to be true and correct in every material matter. . . ."[4] For the Internal Revenue Service to correctly evaluate a taxpayer's claim of particular expenses, deductions, and losses, the Service must of course be provided with information showing whether or not the taxpayer qualifies. This is especially true where the taxpayer's occupation brings into

[3]On this point, Mr. Justice Brennan remarked, "[C]ertainly I would expect this Court to hesitate before affirming the conviction of a fugitive from justice for filing a tax return which omitted his address." Byers v. California, supra, 402 U.S. at 472 (Brennan, J., dissenting). In Marchetti v. United States, supra, the Court overruled United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955), which had held that a gambler's failure to raise his Fifth Amendment objection at the time filing of the wagering tax form was required constituted a waiver of his right to assert the privilege. 390 U.S. at 51-52.

[4]In United States v. Knox, 396 U.S. 77 (1969) the Court recognized that the filing and truthful filing requirements of the Internal Revenue laws might constitute compulsion, but that this compulsion would not constitute a defense to a prosecution for the falsification of the information required to be reported.

play special provisions of the tax laws and regulations. For example, a person whose income is derived from wagering may deduct his wagering losses only to the extent of his winnings from wagering, 26 U.S.C. §165(d). Gambling losses may not be carried back or carried over [See 5 MERTENS, Law of Federal Income Taxation §28.85], and a gambler whose losses offset his winnings must nevertheless report all winnings as gross income and losses as deductions. *McClanahan v. United States*, 292 F.2d 630, 631 (5th Cir. 1961), cert. denied, 368 U.S. 913. Disclosure in the tax return of a gambler's source of income is thus essential. If a gambler fails to provide this information, he subjects himself to a criminal prosecution for tax evasion or perjury; his "choice" to disclose is thus a Hobson's choice.

Nor can we automatically conclude that submitting to the statutory compulsion constitutes waiver of the right to object to the use of the incriminatory disclosure. The "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights, and . . . we 'do not presume acquiescence in the loss of fundamental rights'." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). It would be "artificial, if not disingenuous," *Byers, supra*, 402 U.S. at 442 (Harlan, J., concurring), to distinguish this principle by assuming a waiver of appellant's Fifth Amendment rights in this case merely because he disclosed the source of his income truthfully under the statutory compulsion to truthfully state all material tax information on his return. It is one thing to say that government can compel a person to make disclosures which are deemed necessary for government to adequately administer a program such as the revenue collection system.[5] It is entirely another matter, however, to then disregard the fact that the disclosure was forced and to say that, since the original purpose of compelling disclosure was not inherently hazardous to an individual's rights, any subsequent use of that compelled information is the use of "volunteered" information and therefore

[5]It was on this basis that the Court in California v. Byers, supra, held that a person could be compelled to disclose his presence at the scene of an automobile accident.

constitutionally inoffensive.[6] Such a formulation makes the government's need for the information, rather than the individual's relinquishment of a known right, the controlling factor in the waiver determination, and would allow comprehensive schemes of self-reporting in non-criminal areas to become data banks containing numerous "admissions" of criminal activity, available without limitation to prosecuting authorities. To consider information supplied to the government under such circumstances as voluntarily supplied would ". . . ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation'." *Marchetti, supra*, 390 U.S. at 51.

Although the reporting of incriminatory information on income tax returns would not perhaps have the direct and immediate effect of incriminating a taxpayer, as did the reporting of such information on returns required only of those engaged in criminal activities, we are not persuaded that such information must be the first "link in the chain" of incriminatory evidence to be objectionable. Nor are we persuaded that appellant's right to object to making this disclosure in the first instance—recognized ever since *Sullivan, supra*—was lost by appellant's submitting to the statutory requirement of reporting. We cannot sanction waivers of constitutional rights "without the most deliberate examination of the circumstances surrounding them . . ." *Mar-*

[6]"[D]ifferent considerations apply when the question is not whether information may be compelled but rather to what uses compelled information may be put. Once the return has been filed, prosecution under state [or federal, it would follow] gambling laws can take place only if the State can demonstrate that its evidence is not tainted by information derived from the incriminatory aspects of the return. Since disclosure once made may never be completely undone, this burden must be borne by the State regardless of what additional restrictions are imposed upon use of the return. Accordingly, the considerations that led us to decline the imposition of use restrictions for the future in *Marchetti* and *Grosso* are not compelling in situations where the incriminating information has already been disclosed." Mackey v. United States, 401 U.S. 667, 712-713 (1971) (Brennan, J., concurring).

Mr. Justice Brennan's discussion of the "taint" on compelled disclosures would not appear to be restricted to those disclosures made under a reporting requirement directed solely at illegal activities. And in California v. Byers, supra, Mr. Justice Harlan made the same observation about the taint on disclosures compelled under a scheme which the Court held was not directed solely at criminal behavior. 402 U.S. at 458, n. 10 (Harlan, J., concurring).

chetti, supra, 390 U.S. at 51.[7] This record contains no fact tending to establish that appellant was aware of his right to object and thus the conclusion is impermissible that his declarations were "voluntarily entered upon a public record." *Stillman, supra.* The admission of the returns was thus error and, obviously, the information in them was highly prejudicial.

None of appellant's remaining contentions has merit or is of sufficient substance to warrant discussion.

The judgment is reversed.

WALLACE, District Judge (Dissenting):

I respectfully dissent.

I

The majority reaches a constitutional issue which is not necessary for a proper disposition of this appeal. *Ashwander v. TVA,* 297 U.S. 288, 341, 347 (1936) (Brandeis, J., concurring). Assuming, *arguendo,* that the admission of appellant's tax returns violated the Fifth Amendment privilege against self-incrimination, any error was harmless for two reasons. Fed.R.Crim.P. 52. See *Chapman v. California,* 386 U.S. 18, 22 (1967).

First, there was ample evidence other than the tax returns to demonstrate appellant's gambling proclivities provided by co-conspirators William Lawler and Clarence Swank and witness Emery Long.

Second, and more important, the jury found appellant guilty as charged in Count One of the indictment. Count One did not charge Garner with a substantive gambling or betting violation contrary to federal law, but rather with a conspiracy to violate one or more of the following statutes: 18 U.S.C. § 1084 (interstate transmission of bets or wagers by one in the business of

[7]See, e.g., United States v. Cerone, 452 F.2d 274 (7th Cir. 1971). In that case, the Seventh Circuit held admissible in a criminal proceeding the defendant's testimony in an earlier lawsuit. The court found that since defendant had been advised in the earlier proceeding of his Fifth Amendment privilege and had nonetheless agreed to testify, he had waived his Fifth Amendment privilege with respect to the subsequent use of his testimony. 452 F.2d at 291.

betting or wagering), 18 U.S.C. § 1952 (use of an interstate facility to distribute proceeds of unlawful activity), and 18 U.S.C. § 224 (bribery in sporting contests). The gist of the government's evidence and argument was that co-conspirators Lawler and Swank were elaborately betting on selected horses on the basis of information supplied by appellant. In other words, appellant's gambling tendencies were irrelevant to his part in this particular conspiracy; and, as appellant's attorney correctly argued, there was no testimony proving that Garner had placed any bets on any of the races selected as evidence of the conspiracy. Consequently, the majority errs in assuming that proof of appellant's business of betting and wagering was an essential element of the conspiracy charged. Count Two of the indictment had charged Garner with a substantive violation of § 1084, which would have required proof of a "business of betting and wagering" as an essential element; but appellant's Motion for a Judgment of Acquittal as to Count Two was granted at the end of the government's case.

Consequently, the admission of the tax returns was, at the worst, harmless because Garner's alleged role in the conspiracy was that of an information source, a role that need not be filled by one in the "business."

II

More fundamental than the fact that the alleged error was harmless is the constitutional fact that there was no error at all.

The majority holds, and I agree, that the rule of *United States v. Sullivan,* 274 U.S. 259 (1927), requires all citizens to file income tax returns despite the obvious hazards of self-incrimination. The majority makes a proper application of this rule to require disclosure of the sources of a taxpayer's income.[1] The majority then holds, and I disagree, that the appellant's Fifth Amendment privilege prevents the use of volunteered answers as evidence in this non-tax prosecution.

Without an en banc determination [see *Upton v. Commissioner,* 283 F.2d 716, 723 (9th Cir. 1960)], the majority overrules

[1]The case before us falls squarely within *Sullivan* as defined by *Albertson v. SACB,* 382 U.S. 70, 79 (1965). Clearly the request for sources of income is neutral on its face and directed to the public at large.

Stillman v. United States, 177 F.2d 607 (9th Cir. 1949), which held to the contrary, contending that *Stillman* relied upon a concept of "implied waiver", the theoretical basis of which was repudiated in *Marchetti v. United States*, 390 U.S. 39 (1968). It is unclear to me that *Marchetti* so held. That case dealt with an interrelated statutory system for taxing wagers and itself distinguished *Sullivan*. 390 U.S. at 50-51. *Marchetti* rejected the implied waiver theory only to the extent of the circumstances presented by that case.[2] Therefore, the doctrine is still viable in a *Sullivan*-type situation. Pursuant to *Sullivan*, any claim of Fifth Amendment privilege must be asserted when the income tax return is filed, not at the time of a subsequent prosecution.[3] "[T]o honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim." *Albertson v. SACB*, 382 U.S. 70, 79 (1965).

That the facts of this case (reporting source of income in response to a neutral question) are similar to those of *Sullivan* (reporting amount of income in response to a neutral question) and not to *Marchetti* (an interrelated statutory system to tax wagers) seems abundantly clear. Further, *Sullivan* did not leave open, as contended by the majority, whether information gained through the tax return, similar to the facts secured here, may be blocked from evidence in a subsequent non-tax prosecution. If, as stated in *Sullivan*, the privilege must be asserted at the time the return is filed, there is a waiver after the filing.[4]

Further, I do not find support for the majority opinion in the most recent pronouncement in this area by the Supreme Court. *California v. Byers*, 402 U.S. 424 (1971). Byers asserted a viola-

---

[2]*See* 390 U.S. at 48-49, 50-51.

[3]"But if the defendant desired to test that *or any other point he should have tested it in the return* so that it could be passed upon." 274 U.S. at 264 (emphasis supplied).

[4]*See Heligman v. United States*, 407 F.2d 448, 450-51 (8th Cir.), *cert. denied*, 395 U.S. 977 (1969); *Grimes v. United States*, 379 F.2d 791 (5th Cir.), *cert. denied* 389 U.S. 846 (1967); *Stillman v. United States*, 177 F.2d 607, 618 (9th Cir. 1949) (which the majority overrules); *Shushan v. United States*, 117 F.2d 110 (5th Cir.), *cert. denied* 313 U.S. 574 (1941).

tion of his Fifth Amendment rights when he was charged with leaving the scene of an automobile accident, without furnishing his name and other information as required by a California statute.[5] The California Supreme Court found the statute did not violate the Fifth Amendment *only* if the required disclosures and the fruits thereof could not be used in a subsequent criminal proceeding arising out of the accident.[6] The majority in the case before us adopts this same type of use restriction although the Supreme Court impliedly rejected it in *Byers*. The four-judge plurality opinion, authored by the Chief Justice, clearly found no necessity for such a restriction,[7] and Justice Harlan's concurrence indicated that a restriction was unwarranted as a condition to the statute's enforcement.[8] Therefore, I cannot conclude, as does the majority, that *Byers* dealt only with whether the accident report must be filed and not whether the information in the report may be used as evidence in a subsequent prosecution.

A close reading of *Byers* shows it to be quite similar to this case. Both statutes request information in a neutral manner, the furnishing of which may, in a specific case, provide incriminating answers.[9] In the present matter, Garner furnished answers indicating the source of much of his income from 1965 to 1967 was gambling. Having failed to assert the privilege at the proper time, if indeed it was applicable, he has waived it. *United States v.*

---

[5]California Vehicle Code § 20002(a)(1) (1960). The statute has subsequently been amended. See California Vehicle Code § 20002 (West 1971).

[6]See *Byers v. Justice Court*, 71 Cal.2d 1039, 1050, 458 P.2d 465, 80 Cal.Rptr. 553 (1969).

[7]"We granted certiorari to assess the validity of the California Supreme Court's premise that *without a use restriction* § 20002(a)(1) would violate the privilege against compulsory self-incrimination. We conclude that there is no conflict between the statute and the privilege." 402 U.S. at 427 (emphasis supplied).

[8]"I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute." *Id.* at 458 (Harlan, J., concurring).

[9]To paraphrase Chief Justice Burger: Disclosure of the source of income is an essentially neutral act. Whatever the collateral consequences of disclosing the source of income, the statutory purpose is to implement the federal power to tax. *See* 402 U.S. at 432. *See also id.* at 430, 433-34.

Sullivan, 274 U.S. 259, 263-64 (1927); *Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949).

I feel I am bound by the cases referred to above and must dissent. If, however, the case is to be retried, I suggest the trial court give more consideration to the foundational requirement for the introduction of *The Daily Racing Form*.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-0-72—380

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 566-534

Supreme Court, U. S.
FILED
FEB 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-100

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-100

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner has filed a supplemental memorandum annexing (1) the first page of his 1973 tax return (Form 1040), (2) his letter to the Internal Revenue Service explaining his claim of the Fifth Amendment privilege with respect to the return and (3) a letter to him from the Service stating that his filing "is not a return within the meaning of the Internal Revenue Code" (Pet. Supp. Exh. C, p. 4). It is not possible to tell, on the basis of this information, whether the Service acted properly in rejecting his 1973 return or whether his sweeping claim of privilege (Pet. Supp. Exh. B, pp.

2-3) was legally adequate.[1] However, what is clear is that the incident is irrelevant to the question presented in the petition, which concerns the admissibility of certain limited information from returns on which no claim of privilege was made.

If the Service improperly rejected petitioner's 1973 return (a question on which we intimate no view), that would of course bear upon any litigation that may hereafter arise regarding petitioner's 1973 tax liability and filing obligations. That has nothing, however, to do with the instant case.

For this reason and the reasons stated in our Brief in Opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

---

[1]The only use of petitioner's 1965-1967 tax returns at his trial related to his statement of occupation and of the source of his income (Br. in Opp. 5, n. 6). On the portion of the Form 1040 reproduced by petitioner, his only claim of the Fifth Amendment privilege against self-incrimination was his refusal to state his occupation. However, petitioner's failure to state his occupation (or source of income) was not the basis for the rejection of the return. We are advised by the Internal Revenue Service that petitioner's Form 1040 for 1973 was considered an inadequate filing because it showed, in line 48, "net taxable income," but did not show gross income or deductions used in arriving at that amount. Hence the Form 1040 did not disclose sufficient facts to enable the Service to determine petitioner's correct tax liability. In consequence, the Service concluded that petitioner's filing was "not a return within the meaning of the Internal Revenue Code." Cf. *United States* v. *Porth*, 426 F. 2d 519 (C.A. 10).

Supreme Court, U.S.
FILED
APR 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Associate Counsel

JONATHAN K. GOLDEN, ESQ.
8383 Wilshire Boulevard, No. 510
Beverly Hills, California 90211
(213) 655-5011

BURTON MARKS, a member of the law offices of
BURTON MARKS A PROFESSIONAL CORPORATION
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
Telephone - (213) 655-5011

Attorney for Petitioner

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

Brief for the Petitioner	Page
Opinion Below	1
Jurisdiction	2
Principal Question Presented	2
Subsidiary Questions Presented	2
Statutes Involved	3
Statement of the Case	5
Argument	8
I Petitioner's objection to the introduction of his federal income tax returns should have been sustained	8
A. The "right" as opposed to "privilege" analysis of the constitutional question by the majority constitutes an inadequate basis for its ruling	8
B. Acceptance of the majority opinion invites chaos in the Government's plan for collection of income taxes	9
II The seizure of telephone toll records of petitioner and their subsequent admission into evidence was violative of 47 U.S.C. § 605	10
III Excerpts from the Daily Racing Form, admitted under the authority of 28 U.S.C. § 1732(a), should not have been admitted in that the material did not conform to the requirements of that section, and § 1732(a) is unconstitutional and violative of petitioner's Sixth Amendment right to confrontation	

TOPICAL INDEX

	Page
of witnesses	21
Conclusion	24

TABLE OF AUTHORITIES CITED

Cases

Albertson v. S.A.C.B., 382 U.S. 70 (1965)	7
Berger v. California, 393 U.S. 314, 89 S. Ct. 540 (1969)	24
Bubis v. United States, 384 F.2d 643 (1967)	13, 14, 15, 17, 19
California v. Green, 399 U.S. 149, 90 S. Ct. 1930 (1970)	24
DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969), cert. denied 402 U.S. 949 (1971)	19, 20
Dote v. United States, 371 F.2d 176 (1966)	16, 18, 19
Graham v. Richardson, 403 U.S. 365 (1971)	9
Hanley v. United States, 416 F.2d 1160 (5th Cir. 1969)	23, 24
Hanna v. United States, 393 F.2d 700 (1968)	11, 12
Hanna v. United States, 404 F.2d 405	12, 14, 17
Katz v. United States, 389 U.S. 347 (1967)	19

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Marchetti v. United States, 209 U.S. 38 (1968)	7
McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965)	23, 24
Morrissey v. Brewer, 408 U.S. 471 (1972)	9
Nardone v. United States, 302 U.S. 379 (1937)	11, 19
Nardone v. United States, 308 U.S. 338 (1939)	11
Osborne v. United States, 371 F.2d 913 (9th Cir. 1967)	18
Sabatino v. Curtiss National Bank of Miami Springs, 415 F.2d 632 (5th Cir. 1969), cert. denied 396 U.S. 1052	22
Sherbert v. Verner, 374 U.S. 398 (1963)	9
State of Ohio v. Tims, 90 S.2d 136 (1967) [9 Ohio 2d .....]	22, 23
Stillman v. United States, 177 F.2d 607 (9th Cir. 1949)	6
Sugden v. United States, 226 F.2d 281 (9th Cir. 1955)	12
United States v. Covello, 410 F.2d 536 (2d Cir. 1968)	17, 18
United States v. Sullivan, 274 U.S. 259 (1927)	6

TABLE OF AUTHORITIES CITED

United States Constitution	Page
Fifth Amendment	2, 6, 7, 8, 9, 10
Sixth Amendment	3, 22, 23, 24

United States Codes

18 U.S.C. 1084	3, 5
26 U.S.C. 4251	18
26 U.S.C. 7203	7, 10
28 U.S.C. 1254(1)	2
28 U.S.C. 1732(a)	2, 3, 6, 17, 21, 22, 23, 24
47 U.S.C. 605	2, 4, 5, 6, 10, 11, 12, 13, 14, 15, 17, 20

Federal Rules of Criminal Procedure

Rule 17	2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-100

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

OPINION BELOW

The opinion of the Court of Appeals in the above-referenced matter (Pet. App. A)[1] is reported at 501 F.2d 228.

---

[1] As used herein, "Pet." refers to the Petition for Writ of Certiorari. "App." refers to the joint appendix in this Court; "TR" refers to the Transcript of proceedings at trial also on file with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1974. A Petition for Rehearing was denied by said court on June 11, 1974 (Pet. App. B). On July 10, 1974, Mr. Justice Douglas extended the time for filing a Petition for Writ of Certiorari to and including August 9, 1974 (Pet. App. C). The petition was filed on that date and was granted on February 18, 1975. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

PRINCIPAL QUESTION PRESENTED

Whether a defendant, in a criminal prosecution unrelated to the federal income tax laws, may invoke the protection of the Fifth Amendment privilege not to be "compelled in any criminal case to be a witness against himself . . . " to exclude incriminating answers to questions on his income tax returns.

SUBSIDIARY QUESTIONS PRESENTED

1. **Whether the seizure of telephone toll records of petitioner, and their subsequent admission into evidence, violated rights guaranteed to petitioner under Title 47, United States Code, § 605, under Rule 17 of the Federal Rules of Criminal Procedure, and under the First, Fourth and Ninth Amendments to the United States Constitution.**

2. **Whether various items of evidence admitted under the authority of Title 28, United States Code, § 1732(a)–the**

"business records" exception to the hearsay rule–should have been excluded because some of the material did not conform to the requirements of that section; and whether § 1732(a), as applied, is unconstitutional and violative of petitioner's Sixth Amendment right to confrontation of witnesses.

STATUTES INVOLVED

18 U.S.C. § 1084:

> **"Transmission of wagering information; penalties.**
>
> "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission . . . of bets or wagers . . . shall be fined not more than $10,000 or imprisoned not more than two years, or both."

28 U.S.C. § 1732(a):

> **"Record made in regular course of busines; photographic copies.**
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction,

occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affects its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

47 U.S.C. § 605:

"Unauthorized publication or use of communications.

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication

and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided:* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiring to violate Title 18, United States Code, § 1084. He was sentenced to prison for a term of two years. To prove that he was engaged in the "business of betting and wagering"

–an essential element of the conspiracy as charged–the Government offered into evidence petitioner's federal income tax returns for the years 1965, 1966 and 1967, on which returns petitioner had reported gambling as the principal source of his income. The returns were admitted over petitioner's objection.

A divided panel of the Court of Appeals for the Ninth Circuit filed an opinion reversing the judgment of conviction on June 5, 1972. The Government's Petition for Rehearing and Suggestion for Rehearing In Banc was granted, and on April 11, 1974, the Court of Appeals filed an opinion affirming the conviction, five judges dissenting. (Pet. App. A.) The majority held that notwithstanding the statutory compulsion to provide the Government with information on the return, petitioner could have asserted his Fifth Amendment privilege against self-incrimination therein, and his failure to do so rendered the privilege unavailable to him at the criminal trial (Pet. App. p. 9).

A number of subsidiary issues raised on appeal were rejected by the court without discussion (Pet. App. p. 52). Two of these subsidiary issues involve: (1) the introduction into evidence of telephone toll records over petitioner's objection that their seizure and subsequent admission into evidence was, among other things, violative of 47 U.S.C. § 605, and (2) the admission into evidence of excerpts from the "Daily Racing Form" over petitioner's objection that such publication did not conform to the requirement of a "business record" under 28 U.S.C. § 1732(a).

Relying upon *United States v. Sullivan*, 274 U.S. 259 (1927), and *Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949), the majority of judges of the Court of Appeals

held that petitioner, as a taxpayer, could have asserted his Fifth Amendment privilege against self-incrimination on his tax returns and that failure to do so in the first instance rendered the privilege unavailable at a later date. The majority reasoned that the Fifth Amendment affords a privilege to refrain from answering when incriminating information is first requested, and that once answers are provided there is no concomitant right which can be invoked retrospectively to exclude them. Fundamental to the majority's reasoning was the notion that questions on income tax returns are directed to the public at large, rather than individuals "inherently suspect of criminal activities" in "an area permeated with criminal statutes."[2] Thus, the compulsion to provide the information was not deemed by the majority to be of a caliber which would render answers "involuntary."

The dissenting judges declined to analyze the constitutional question in terms of a "right-privilege" distinction and, instead, observed that the Fifth Amendment operates both as a privilege to refuse to answer and, when answers are nonetheless compelled, affords a defendant the right to exclude those answers in subsequent criminal proceedings (Pet. App. pp. 11, 12). The minority of the Court of Appeals were of the opinion that the application of the Fifth Amendment in the instant case should be governed by *Marchetti v. United States*, 209 U.S. 38 (1968), which held that the privilege is available to exclude incriminating answers on tax returns at trial, even though the defendant had failed to invoke his privilege on the tax return. Additionally, the dissent opined that the statutory compulsion (26 U.S.C. § 7203) to

---

[2]See Albertson v. S.A.C.B., 382 U.S. 70, 79 (1965).

give truthful and complete answers on the return renders those statements compelled within the meaning of the Fifth Amendment and, accordingly, inadmissible in evidence in a prosecution against the declarant.

ARGUMENT

I

Petitioner's Objection To The Introduction Of His Federal Income Tax Returns Should Have Been Sustained.

No more cogent or succinct argument in support of petitioner's position can be made than that advanced in the dissenting opinion authored by Judge Koelsch of the Court of Appeals (501 F.2d 228, 230) (Pet. App. pp. 10 - 49). Petitioner hereby adopts the minority opinion of the Court of Appeals as his principal argument to this Honorable Court.

A. The "right" as opposed to "privilege" analysis of the constitutional question by the majority constitutes an inadequate basis for its ruling.

The holding of the majority of the Court of Appeals has as its premise that the Fifth Amendment creates a privilege against self-incrimination which must be asserted at the time it first becomes viable. Otherwise, the privilege is lost. While recognizing a defendant's Fifth Amendment "right" to exclude compelled statements which are self-incriminating, and further that petitioner was under a statutory compulsion to provide answers on his income tax returns, the majority declined to

find a Fifth Amendment "right" which can be invoked retrospectively. (Pet. App. p. 9.)

The purported distinction between a "right" and a "privilege" as applied to the constitutional mandates contained in the Fifth Amendment is illusory and cannot provide an adequate basis for the majority holding, for in *Graham v. Richardson,* 403 U.S. 365, 375 (1971), this Court declared:

> " . . . [T]his court now has rejected the concept that constitutional rights turn on whether a governmental benefit is characterized as a 'right' or as a 'privilege'."

See also *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

B. Acceptance of the majority opinion invites chaos in the Government's plan for collection of income taxes.

The minority opinion of Judge Koelsch suggests that, contrary to the assertion of the majority, a taxpayer might well be required to provide full and complete information on his income tax return, in exchange for a subsequent use immunity of such information, should it prove incriminating at some later time. The alternative to the granting of such use immunity is to permit a multitude of taxpayers to invoke their Fifth Amendment privilege not to provide full and complete answers on their tax returns and, in effect, hamstring the Internal Revenue Service in its determination of whether or not the returns thus filed are accurate. It takes little imagination to foresee the welter of complicated administrative procedures which the Internal Revenue Service will be required to undertake if the majority's ruling is allowed to

stand.

Finally, and as proof of the foregoing assertion, the Court's attention is invited to the Supplement and Addendum to the Petition for Writ of Certiorari with exhibits. Petitioner filed his 1973 tax return asserting his Fifth Amendment privilege against self-incrimination, along with an explanatory letter to the Internal Revenue Service. In return he received a letter from the Government indicating that his tax return was "not acceptable" and not a "return" and suggesting that criminal penalties might be forthcoming under 26 U.S.C. § 7203. (See Exhibit "C" annexed to the Supplement and Addendum.)

Although these matters do not constitute a part of the record before this Honorable Court, it would appear that petitioner is now faced with precisely that dilemma foreseen by Judge Koelsch in his dissenting opinion (Pet. App. pp. 45 - 46).

II

The Seizure of Telephone Toll Records Of Petitioner And Their Subsequent Admission Into Evidence Was Violative Of 47 U.S.C. § 605.

In this case, the Government subpenaed from the telephone company the records of telephone calls placed by petitioner from his private telephone. Petitioner's objection thereto was overruled by the trial court, and the toll slips were admitted into evidence (App. pp. 30 - 36). The records were offered by the Government to establish that calls had been placed from petitioner's phone to other telephones listed in

the names of co-defendants. From the existence of the calls, the jury was permitted to infer the content of the conversations, to wit, illegal gambling.

The first clause of 47 U.S.C. § 605 provides in part:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; . . . . "

This clause applies by its terms only to those employees involved in the actual transmission of communications. *Nardone v. United States,* 302 U.S. 379 (1937), 308 U.S. 338 (1939). The class of persons covered by this section has been narrowly construed by this Court and the lower federal courts. See *Nardone.* The Fifth Circuit analyzed the clause in *Hanna v. United States,* 393 F.2d 700 (1968), as follows:

> "In a broad sense all telephone employees assist in receiving or transmitting communications, for that is the end result of the telephone company's

> business. But, as the first *Nardone* appeal indicates . . . this first clause of Section 605 has reference to those employees to whom the communications necessarily become *known*. In fact, here the communications were sent and received by means of direct dialing without the use of a telephone central or other employee. There were no employees or persons whose transmitting and receiving duties permitted them to learn the contents of the telephone conversations. The first clause of Section 605 therefore has no application to the facts of this case." (393 F.2d at 705.)

The Fifth Circuit reconsidered the case at 404 F.2d 405. At that time, the court found that Section 605 was not applicable as to defendant Hanna, who had used a device in an attempt to avoid being billed for his long distance calls to defendant Modell. The court found Section 605 inapplicable, on the basis of *Sugden v. United States,* 226 F.2d 281 (9th Cir. 1955), in cases in which the use of the communication facility is illegal. With regard to Modell, the Fifth Circuit found that there would be no violation of Section 605 "in obtaining and divulging the statement of Modell if the telephone company employee who learned of the communications and thereafter divulged their existence and contents was, within the meaning of the first clause of Section 605, '[a] person . . . transmitting or assisting in transmitting . . . ' A security officer . . . should be included among [this class of] company employees . . . . That is true because the obligations imposed upon the telephone company by the Communications Act

and Internal Revenue laws . . . both authorized and required it to discover the existence and parts of the contents of the *illegal* calls." (Emphasis added.)

The court's rationale for allowing disclosure was to protect the integrity of the telephone company by allowing it to uncover fraud against the telephone company in the use of its facilities.

This view is consistent with that of the Ninth Circuit as enunciated in the case of *Bubis v. United States,* 384 F.2d 643 (1967). Section 605 creates two classes of individuals. The first clause creates a class consisting of two groups: (1) Those specifically authorized by the parties to the communication, and those employees of the communication facility to whom the communication necessarily becomes known; and (2) the second clause of Section 605 includes all those not in the first category. Members of the first class may divulge the information only through authorized channels, or to authorized recipients of the communication, to proper accounting officers or to a court of competent jurisdiction only under subpoena. All those not members of the class created by the first clause are forbidden by the second clause to intercept or divulge the communication under any circumstances. The Ninth Circuit has said in *Bubis, supra:*

> "The first part of the section is directed to those employees of systems of communications who have to do the *sending, receiving or forwarding* of interstate or foreign communications by wire or radio, and provides that no such person shall divulge or publish the existence, contents, substance, purport or effect . . . etc."

(384 F.2d at 646. Emphasis added.)

The court stated further that the second clause was designed to protect the integrity of the communication system and privacy "to those who use the facilities in a proper and normal manner" (at p. 647). The Ninth Circuit found the communication inadmissible because it was obtained without the "knowledge or consent of appellant or any of the persons with whom he spoke on the telephone" (at p. 647).

The court found, however, that when a subscriber violates his subscription rights through fraud on the telephone company, he is deemed to consent to monitoring. Even in this case, however, the court was careful to limit the use of the information to the fraud prosecution. See footnote 5 at page 648, in which the court explicitly decides that it would be difficult to find any implied consent on the part of the defendant to "disclosure for the purpose of convicting him of using interstate telephone facilities for gambling. Disclosure for this purpose contributed nothing either to the collection of long distance tolls . . . or to preventing him or others from thereafter using long distance telephone facilities without paying."

While it is clear that both *Hanna* and *Bubis* were concerned with special surveillance by telephone security agents, this difference is of little significance with regard to the instant case. Both the Fifth Circuit and the Ninth Circuit recognize that attempted fraud upon the telephone company provides an exception to Section 605 consistent with the intent of Congress to protect the integrity of the communication facilities. In the instant case, that exception is not applicable, since there was no attempt to defraud the

telephone company. Therefore, the clear mandate of Section 605 applies. The integrity of the facility is not at stake, and the first clause thus allows disclosure only by employees engaged in "sending, receiving, or forwarding" of communications. *Bubis v. United States, supra.*

In this case, the Government subpenaed from the telephone company the toll records of petitioner for calls placed by direct dialing. The initial inquiry is whether the billing department is included in the class of employees to whom the existence of the call necessarily becomes known. Initially, it must be noted that these employees are not involved in the actual sending, receiving or forwarding of the communication. Their function relates only to the necessary business operation of the telephone company. While it is possible that some member of the billing department may become aware, in the course of his employment, that a toll has been incurred of a particular amount, absent fraud there is no necessity for his knowledge of the exact number to which the call was placed.

Moreover, it should be noted that the accounting department is not authorized by the language of Section 605 to divulge the existence of the communication. Rather, the employees who are members of the class created in clause one are authorized to disclose the communication to the accounting department—again in order to protect the financial interest of the company. If the accounting department had been a member of the class of those employees to whom the communication necessarily becomes known, there would have been no reason to include a special authorization for disclosure *to* the accounting department. Allowing disclosure *by* the accounting department would

thus violate the obvious intent of the legislation.

The Seventh Circuit was confronted with a similar problem in a gambling and bookmaking prosecution in *Dote v. United States,* 371 F.2d 176 (1966), in which the court considered the issue "whether dial impluses which a pen register records are precluded from disclosure by clause two of 47 USCA 605" (at p. 179). The court found that the mere dialing of the number was a sufficient communication to be protected "if the activity of the initiating subscriber in dialing his telephone would result in a signal to the telephone of the recipient" (at p. 180). The court went on to say at page 181:

> "[8] The ringing of a telephone may be more than merely a signal indicating a call. Even if a call is not answered, a call at a certain time, or a certain number of rings, or repeated calls may well be a pre-arranged message or signal. The ringing of a telephone, therefore, may of itself be a communication, and a device attached to the telephone line, which indicates to a third party that such a communication is taking place or is about to take place, intercepts it. *United States v. Caplan, supra,* 255 F. Supp. at 808.
>
> "[9] Further, we cannot pretend that the Government, while not hearing any verbal communication, did not inferentially have a reasonably good notion of the general substantive nature of the communications the pen register indicated were being initiated. In circumstances such as those in this case, knowledge of the existence of the communication is knowledge of its likely

> character."

Similarly, in the instant case, the Government attempted to imply a substantive nature from the "existence" of the phone communications, in contradiction to Section 605. If the mere attempt at making a connection is to be considered sufficient communication for the purposes of Section 605, then, *a fortiori,* the existence of an actual connection invokes the protection of the section.

The Second Circuit has ruled that similar toll slips were admissible in *United States v. Covello,* 410 F.2d 536 (2d Cir. 1968). The court acknowledged that Section 605 created two classes of employees (at p. 541) and agreed that "Section 605 was not intended to apply only to the substance of communications" (at p. 542). The court reasoned, however, that in *Covello,* which involved a federal gambling prosecution, there was no concern with manipulative use of the pen register, but only the question of admissibility of records kept "in the ordinary course of the company's business." The court seemed to feel (see note 8 at p. 542) that if a court were willing to admit records obtained through monitoring, as in *Bubis,* records kept in the ordinary course of business should be admissible. The court failed to consider that *Hanna* and *Bubis* admitted the records only for prosecution arising out of fraud against the telephone company. While the reasoning in *Covello* may be relevant to the admissibility of the toll records in a fraud situation, the same argument is inconsistent with the reasoning of the Ninth Circuit in *Bubis,* which created an exception only for the fraud prosecution. The court in *Covello* takes the case out of Section 605 by resort to 28 U.S.C. § 1732, the Federal Business Records Act. The rationale is apparently that a procedure loses its

otherwise illegal character once its use becomes part of the regular course of a company's business. The mere fact that the telephone company engages in a particular practice on a large scale is patently irrelevant. The concept implicitly contains the notion that the existence of the toll slips is widely known and accepted and that, therefore, the subscriber somehow acquiesces in their use in a prosecution against him. This notion directly contradicts the statement in *Dote* quoted *infra* concerning the proper use of the toll slips as an aid to billing. A subscriber's "acquiescence"–if there is any–for use in facilitating the billing of toll charges does not imply an acquiescence for use in prosecution, and common sense dictates precisely the reverse conclusion. Moreover, the fact that these records are to be kept in order that the telephone company can accurately compute the federal tax imposed by 26 U.S.C. §§ 4251 *et seq.* militates against finding any "acquiescence" by the subscriber, who is left with the choice of having his calls monitored or the unrealistic alternative of not using his phone. Finally, the Government's purpose in introducing the toll slips was obviously to prove the existence of a communication. Their use for this purpose is clearly inappropriate even under *Covello*. See *Osborne v. United States*, 371 F.2d 913 (9th Cir. 1967).

Toll records kept in the course of the telephone company's business are designed to benefit the subscriber and the telephone company in order to resolve billing disputes. It is not the proper business use of the records to make them available to Government authorities for use in prosecution. As the court noted in *Dote, supra* (at p. 181)–

> "Of course, [the telephone company] may make a proper business use of a pen register with the consent of its subscriber. Its original use was to check dialing accuracy of new dial customers. Its service use has included a situation where a customer complains he is being charged for more calls than he makes. Thus, the pen register serves its intended business function."

The proper focus of inquiry, as noted in *Bubis* (at p. 647), is the reliance of the communicating parties with regard to freedom from governmental invasion of the right to privacy.

> "The same consideration may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution."
>
> *Nardone v. United States, supra*, 302 U.S. at 383.

The allowance of the divulgence of the existence of telephone communications in this case resulted in the inconsistent proposition that an individual is more extensively protected against governmental invasion through the use of a public telephone than in the use of a telephone in his private residence. See *Katz v. United States*, 389 U.S. 347 (1967).

In *DiPiazza v. United States*, 415 F.2d 99 (6th Cir. 1969), *cert. denied* 402 U.S. 949 (1971), the court found that the subscriber "authorized" the use of the slips–a finding with which petitioner has already taken exception. The court in *DiPiazza* went on to say:

> "Having held that the maintenance of the toll records and the making of the records does not constitute an 'interception' forbidden by § 605, we now deal with the appellant's contention that the submission of the records to the IRS was a 'divulgence' forbidden by § 605.
>
> "Only the first clause of 47 U.S.C. § 605 could be construed as prohibiting the telephone company from turning its records over to the Government since there was no interception of a message in violation of section 605's later clauses."

Petitioner contends that *DiPiazza* is either carelessly written or an incorrect interpretation of the applicability of the two clauses of Section 605. The case, however, provides an excellent basis for analyzing the section.

Section 605 operates under two variables: (1) the persons authorized to hear the conversation, and (2) the concept of interception versus non-interception. Petitioner submits that Section 605 covers all instances in which the existence, etc. of a call becomes known. If the existence is ascertained because it "necessarily becomes known" to the persons described in clause one, divulgence is allowed under certain conditions. Any other means of discovery of the existence of the call is an interception under clause two and divulgence is prohibited. As noted above, in *Bubis*, the court found that the first clause created a class including telephone employees to whom the conversation necessarily becomes known, as well as those persons who are authorized by the parties. The second clause includes *all other persons*. Members of the first class are defined as people to

whom the transmission is made known *without resort* to *any* "interception." The first clause makes no mention of "interception" precisely because the individuals in the first class are aware of the existence of the call without resort to an interception. The persons described in the second clause, who are *all* persons not employed in the "sending, receiving or forwarding" nor authorized specifically by the parties, may not divulge the existence of the call at all. These persons are described by the fact that they can only discover the existence of the call through an "interception." Since this clause includes all those not in the first clause, "interception" is necessarily defined as *any* means which is used to discover the existence, etc. of a call by persons not defined in the first clause. Thus, excluding those persons not specifically authorized by the parties, there is an interception any time anyone who is not engaged in "sending, receiving or transmitting" becomes aware of the existence of a call; and divulgence is therefore prohibited. Thus, divulgence is only allowed under clause one; and the divulgence may only be through persons engaged in "sending, receiving or transmitting" to whom the existence of the call "necessarily becomes known." There is no such person in the case of direct dialing, and the divulgence of the "existence" of the call is prohibited.

III

Excerpts From The Daily Racing Form, Admitted Under The Authority of 28 U.S.C. § 1732(a), Should Not Have Been Admitted In That The Material Did Not Conform To The Requirements Of That Section, And § 1732(a)

Is Unconstitutional And Violative Of Petitioner's Sixth Amendment Right To Confrontation Of Witnesses.

Several excerpts from the Daily Racing Form were admitted in evidence over petitioner's objection, in order to prove that particular horses had raced at given times and race tracks (App. pp. 36 - 49).

Initially, it is difficult to imagine how the Daily Racing Form is considered to be a business record of the California Horse Racing Board. The form is compiled by a private agency, for its own business purposes; the employees of the Horse Racing Board do not compile, edit, correct, or authenticate the records. The sole claim the form has for admissibility is that the Board calls it "official." This title, obviously, in no way secures the accuracy of the contents. It is by no means clear that the Board would have the power to compel the Daily Racing Form to change inaccuracies in its compilation. Under these circumstances, the form cannot logically be deemed compiled "in the regular course" of the Horse Racing Board's business. Moreover, as was stated in *Sabatino v. Curtiss National Bank of Miami Springs,* 415 F.2d 632 (5th Cir. 1969), *cert. denied* 396 U.S. 1052, the offered items "must not themselves be mere cumulations of hearsay."

In any event, petitioner submits that the Federal Business Records Act violates, at least in some circumstances, the Sixth Amendment right to confrontation of witnesses. *State of Ohio v. Tims,* 90 S.2d 136 (1967) [9 Ohio 2d .....]. In *Tims,* the Ohio court stated:

" . . . As was said in *Pointer v. Texas,*

380 U.S. 400, at 405:

" 'There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.'

"This right of confrontation includes the right of cross-examination of the person who is the actual witness against him. If applicable in a criminal case, the Business Records as Evidence Act denies him such right. The act permits the introduction of evidence in the form of records without requiring the presence of the person who actually made the examination. It is this person who is the actual witness against the accused, not the custodian, and it is this witness that the accused has the right to cross-examine to determine his qualifications and to determine whether the tests were made properly."

Admittedly, there is little authority for this portion of petitioner's argument; however, this in no way limits its efficacy. In *Hanley v. United States,* 416 F.2d 1160 (5th Cir. 1969), the court found that the Business Records Act did not violate the Sixth Amendment. That case relied on *McDaniel v. United States,* 343 F.2d 785 (5th Cir. 1965), where, on the contrary, the court stated, at page 789, that

not all records which come under the Business Records Act meet the standards of the Sixth Amendment. The court in *Hanley* and *McDaniel* felt that *reliability* was insured by conformity to the Business Records Act. Reliability may be sufficient to satisfy the hearsay requirement in a civil case, but it is not sufficient to satisfy confrontation. In *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930 (1970), this Court analyzed the difference between confrontation and hearsay, and concluded that there was not complete overlap. Hearsay protects reliability through emphasis on the circumstances; confrontation, on the other hand, looks to the source. The latter is constitutionally protected in criminal proceedings. See *Berger v. California*, 393 U.S. 314, 89 S. Ct. 540 (1969). Thus, at least in the case in which the source does not submit to cross-examination on his perception, truthfulness, etc., admission of records under the purported authority of Section 1732(a) is unconstitutional and grounds for reversal.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

BURTON MARKS,
A Member of
BURTON MARKS, A PROFESSIONAL CORPORATION

Of counsel:

JONATHAN K. GOLDEN

Attorney for Petitioner

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on APRIL 9th, 1975, I served the within BRIEF FOR THE PETITIONER (No. 74-100 - October Term, 1974) on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 (3 copies)

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 (2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on APRIL 9th, 1975, at Huntington Beach, California.

D. A. Standefer

DEAN-STANDEFER, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

No. 74-100

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
ANDREW L. FREY,
KEITH A. JONES,
Deputy Solicitors General,
JEROME M. FEIT,
FREDERICK W. READ III,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision and statutes involved	2
Statement	3
Summary of argument	7
Argument:	
I. A taxpayer who fails to assert his privilege against self-incrimination at the time of filing his federal income tax return may not subsequently invoke that privilege as a bar to the use of his return in a criminal prosecution	11
A. Failure to assert the privilege at the time of filing precludes any subsequent invocation of the privilege at trial	12
1. Petitioner's voluntary disclosures were not compelled in the manner protected against by the Fifth Amendment	13
2. A rule conferring automatic use immunity on information supplied on tax returns would seriously impede enforcement of both tax and nontax laws	22

Argument—Continued
I. B. It is doubtful whether the privilege against self-incrimination may be asserted as a basis for refusing to answer the questions on a federal income tax return 27
II. Any error in the admission into evidence of petitioner's federal income tax returns was harmless 42
III. The other evidence introduced against petitioner was properly admitted 45
A. The admission into evidence of the telephone toll records did not violate Section 605 of the Communications Act 46
B. Racing charts of the California Horse Racing Board were properly admitted under the Business Records Act 49
Conclusion 51

CITATIONS

Cases:

Albertson v. *Subversive Activities Control Board*, 382 U.S. 70 ..... 37, 38, 40
Bram v. *United States*, 168 U.S. 532 30
Brandon v. *United States*, 382 F. 2d 607 48
Brown v. *United States*, 359 U.S. 41 46
Bubis v. *United States*, 384 F. 2d 643 48
California v. *Byers*, 402 U.S. 424 ..... 9, 28, 29, 32, 33, 34, 35, 40, 41
Chapman v. *California*, 386 U.S. 18 43
Couch v. *United States*, 409 U.S. 322 16
Counselman v. *Hitchcock*, 142 U.S. 547 ..... 24, 26, 30
Di Piazza v. *United States*, 415 F. 2d 99 48
Dutton v. *Evans*, 400 U.S. 74 ..... 11, 50

Cases—Continued

Garrity v. *New Jersey*, 385 U.S. 493 ..... 16, 17, 18
Grimes v. *United States*, 379 F. 2d 791, certiorari denied, 389 U.S. 846 13
Grosso v. *United States*, 390 U.S. 62 ..... 21, 37, 38
Hanley v. *United States*, 416 F. 2d 1160, certiorari denied, 397 U.S. 910 50
Haynes v. *United States*, 390 U.S. 85 ..... 37, 38
Hoffman v. *United States*, 341 U.S. 479 ..... 9, 30, 31, 32, 33, 34, 36, 39, 42
Howat v. *Kansas*, 258 U.S. 181 20
Interstate Commerce Commission v. *Brimson*, 154 U.S. 447 31
Kastigar v. *United States*, 406 U.S. 441 ..... 24, 26
Kerner v. *United States*, 493 F. 2d 1124, certiorari denied, 417 U.S. 976 25
Lefkowitz v. *Turley*, 414 U.S. 70 ..... 16, 17, 18
Mackey v. *United States*, 401 U.S. 667 ..... 11, 21
Maness v. *Meyers*, 419 U.S. 449 ..... 7, 13, 19
Marchetti v. *United States*, 390 U.S. 39 ..... 9, 21, 37, 38, 39, 40
McCarthy v. *Arndstein*, 266 U.S. 34 30
Michigan v. *Tucker*, 417 U.S. 433 16
Miranda v. *Arizona*, 384 U.S. 436 ..... 16, 17
Mishkin v. *New York*, 383 U.S. 502 46
Nolan v. *United States*, 423 F. 2d 1031 48
Pauldino v. *United States*, 500 F. 2d 1369 12
Quinn v. *United States*, 349 U.S. 155 30
Rogers v. *United States*, 340 U.S. 367 14
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U.S. 574 ..... 13, 15
Stillman v. *United States*, 177 F. 2d 607 13
United States v. *Bisceglia*, 420 U.S. 141 33
United States v. *Bishop*, 412 U.S. 346 20
United States v. *Covello*, 410 F. 2d 536, certiorari denied, 396 U.S. 879 ..... 47, 49

Cases—Continued

	Page
United States v. *Daly*, 481 F. 2d 28, certiorari denied, 414 U.S. 1064	20
United States v. *Freed*, 401 U.S. 601	23
United States v. *Gallo*, 123 F. 2d 229	48
United States v. *Haili*, 443 F. 2d 1295	50
United States v. *Knox*, 396 U.S. 77	21
United States v. *Kordel*, 397 U.S. 1	7, 14, 16
United States v. *Lookretis*, 398 F. 2d 64	21
United States v. *Mandujano*, No. 74–754, certiorari granted, March 24, 1975	14
United States v. *Miller*, No. 74–1179, certiorari granted, June 9, 1975	46
United States v. *Monia*, 317 U.S. 424	7, 14, 15
United States v. *Murdock*, 284 U.S. 141	14
United States v. *Porth*, 426 F. 2d 519, certiorari denied, 400 U.S. 824	20
United States v. *Silverman*, 449 F. 2d 1341, certiorari denied, 405 U.S. 918	13
United States v. *Smith*, 484 F. 2d 8, certiorari denied 415, U.S. 978	13
United States v. *Stevens*, 510 F. 2d 1101	47
United States v. *Sullivan*, 274 U.S. 259	9, 12, 34, 38
United States v. *United States Coin & Currency*, 401 U.S. 715	22
Uphaus v. *Wyman*, 360 U.S. 72	20
Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103	14
Worden v. *Searls*, 121 U.S. 14	20
Constitution, statutes and regulations:	
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:	
Section 220	47
Section 605	3, 10, 44, 45, 46
Constitution of the United States, Fifth Amendment	*passim*

Constitution, statutes and regulations—Continued

	Page
Business Records Act:	
28 U.S.C. 1732	3, 45, 48
28 U.S.C. 1732(a)	49, 50
Internal Revenue Code of 1954 (26 U.S.C.):	
Section 6011	2
Section 6012 (Supp. III)	3
Section 6020(b)	18
Section 7203	19, 20
Section 7602(2)	19
Section 7604	19
18 U.S.C. 224	4
18 U.S.C. 371	3–4, 41
18 U.S.C. 1084	4, 32, 42
18 U.S.C. 1952	4
18 U.S.C. 4208(a)(2)	6
18 U.S.C. 6004	19, 42
Federal Rules of Criminal Procedure, Rule 17(a)	46
Treasury Regulations on Procedure and Administration:	
26 C.F.R. 301.6103(a)	36
26 C.F.R. 301.6103(a)–1(g)	25
Miscellaneous:	
Bittker, *Taxing Income From Unlawful Activities*, 25 Case-West. Res.L. Rev. 130 (1974)	25
Department of Commerce, *Statistical Abstract of the United States, 1974*	33
Grey, *Do We Have An Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975)	32
Note, 85 Harv. L. Rev. 269 (1971)	31
Note, 86 Harv. L. Rev. 914 (1973)	11, 26
V Wigmore, *Evidence* (Chadbrown rev. 1974)	51

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–100

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The panel and *en banc* opinions of the court of appeals (Br. in Opp. App; Pet. App. A) are reported at 501 F. 2d 228 and 236.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on April 11, 1974. A timely petition for rehearing was denied on June 11, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and until August 9, 1974, and the petition was filed on the latter date. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a taxpayer who fails to assert his privilege against self-incrimination at the time of filing his federal income tax return may subsequently invoke that privilege as a bar to the use of his return in a criminal prosecution.

2. Whether any error in the admission into evidence of petitioner's federal income tax returns was harmless.

3. Whether the other evidence introduced against petitioner was properly admitted.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Sections 6011 and 6012 of the Internal Revenue Code of 1954, 26 U.S.C. 6011 and 6012, provide in pertinent part:

> Section 6011(a). When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.
>
> * * * * *

> Section 6012(a). Returns with respect to income taxes * * * shall be made by * * * [e]very individual having for the taxable year a gross income of $750 or more * * *. [Supp. III.]

Section 605 of the Communications Act of 1934, 48 Stat. 1103, as amended, 47 U.S.C. 605, provides in pertinent part:

> * * * [N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except * * * (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

The Business Records Act, 28 U.S.C. 1732, provides in pertinent part:

> In any court of the United States * * *, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

STATEMENT

Petitioner was indicted in the Central District of California for conspiring, in violation of 18 U.S.C.

588-588—75——2

371, to violate 18 U.S.C. 224 (bribery in sporting contests), 1084 (interstate transmission of bets or wagers), and 1952 (use of an interstate facility to distribute proceeds of unlawful activity) and for aiding and abetting the interstate transmission of bets or wagers, in violation of 18 U.S.C. 1084. At his first trial, petitioner was convicted on the conspiracy charge, but the jury was unable to reach a verdict on the substantive offense.[1] Petitioner's conviction was set aside on the ground that the prosecutor had improperly commented on petitioner's failure to testify. Petitioner was then retried, again before a jury. The issues before this Court concern the correctness of the district court's rulings on the admissibility of evidence in the second trial.

The conspiracy count of the indictment charged that petitioner, Clarence Swank, William Lawler, and others conspired to violate federal gambling laws. The object of the conspiracy, as charged in the indictment (C.R. 183),[2] was as follows:

> [D]efendants and their unindicted co-conspirators would arrange to fix horse races, by means of bribery, injecting stimulants in horses, and other means, and would secure information regarding particular horses and jockeys from sources unavailable to the general public. Based upon these arrangements and this information,

[1] At that trial, petitioner's co-defendant Clarence Swank was convicted both of conspiracy and of interstate transmission of wagers; his co-defendant Wayne Donaway was convicted of interstate transmission of wagers and of the use of interstate facilities to distribute proceeds of unlawful activity.

[2] "C.R." refers to the two-volume clerk's record of pleadings.

> defendants would attempt to place and [would] place wagers on particular horses. In order to maintain high pari-mutuel odds, and in order to avoid others not [a] party to the conspiracy placing wagers on the same horses, wagers were placed with bookmakers, away from the track, shortly before [the] starting time of the race in which the particular horse was running.

Co-conspirators Swank and Lawler testified as to petitioner's role in the conspiracy, which was to furnish them with the information necessary for the placing of bets. The government introduced telephone toll records that revealed in detail the workings of the betting arrangements,[3] but the indictment did not charge, and the government did not attempt to prove, that petitioner himself had placed any wagers in furtherance of the conspiracy.

The district court also admitted into evidence petitioner's federal income tax returns for the years 1965, 1966, and 1967, over petitioner's objection that nontax prosecutorial use of the returns would violate his privilege against self-incrimination. The returns showed that petitioner had reported "gambling" or "wagering" as his major source of income: on his 1965 return, petitioner had listed his occupation as "professional gambler" and declared $8,022 as miscellaneous income derived from "gambling"; on his 1966 return, petitioner had declared $22,000 as "wagering" income; and on his 1967 return, he had declared $25,400 as "wagering" income (see C.R. 67). Peti-

[3] Petitioner objected to the introduction of the telephone toll records. See pp. 45–48, *infra*.

tioner had not claimed the privilege against self-incrimination on his returns or at the times they were filed.

At the close of the government's case, the trial judge acquitted petitioner of the substantive offense of aiding and abetting the interstate transmission of bets or wagers. Petitioner was then convicted on the conspiracy count. He was sentenced to two years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2).[4]

A panel of the court of appeals reversed, with one judge dissenting (Br. in Opp. App.). The government's petition for a rehearing *en banc* was granted,[5] and the full court affirmed the conviction, with five judges dissenting (Pet. App. A). The majority reasoned that although the privilege against self-incrimination might have entitled petitioner to refuse

[4] Petitioner was released on bond pending appeal. Bond was revoked after petitioner was found in possession of a suitcase containing paraphernalia and drugs of a type used to stimulate and depress race horses. The court of appeals affirmed the bond revocation, and this Court denied certiorari to review that action, 416 U.S. 935, after the government indicated that it would not move for petitioner's confinement unless and until the court *en banc* affirmed the conviction. Although the conviction has now been affirmed, the government so far has not sought petitioner's confinement, and he remains free on bond.

[5] On September 11, 1972, an order was filed denying the government's petition for rehearing and rejecting the suggestion for rehearing *en banc*, stating that no judge had requested a vote. In fact, however, one judge had requested a vote. When this error was called to the clerk's attention, the mandate was withheld pending the vote, and on December 13, 1972, the court granted rehearing *en banc*. Petitioner applied to this Court for a writ of mandamus or prohibition to prevent the rehearing, but tne application was denied. 411 U.S. 963.

to answer certain questions on the federal income tax return forms, the privilege did not operate in a self-executing manner to confer use immunity upon the answers that petitioner had not refused to furnish. The dissenters took the position that effectuation of the privilege, whether or not asserted at the time the return was filed, requires imposition of a restriction against the use of the return in any criminal prosecution of the taxpayer for a nontax offense.

SUMMARY OF ARGUMENT

I

A. A taxpayer who fails to assert his privilege against self-incrimination at the time he files his federal income tax return may not subsequently invoke that privilege as a bar to the use of that return in a criminal prosecution. The Fifth Amendment privilege "is not a self-executing mechanism; it can be * * * lost by not asserting it in a timely fashion." *Maness* v. *Meyers,* 419 U.S. 449, 466.

The preparation and filing of an income tax return may be analogized to the giving of testimony in a civil proceeding. It is clear that when such testimony is given without a contemporaneous claim of privilege, it has not been "compelled" in the manner protected against by the Fifth Amendment and therefore may be used against the witness in a subsequent criminal prosecution. See, *e.g., United States* v. *Kordel,* 397 U.S. 1, 10; *United States* v. *Monia,* 317 U.S. 424, 427. A taxpayer, when completing and filing his return, is subject to no greater testimonial compulsion than that

experienced by a witness in an ordinary civil proceeding; indeed, the sanctions to which a taxpayer may be subjected on account of his assertion of the Fifth Amendment privilege as a reason for refusing to answer a question on a return are both less immediate and less severe than those that may be visited upon a recalcitrant witness.

Since the Fifth Amendment confers an immunity from prosecutorial use only upon disclosures made as a result of testimonial compulsion, a taxpayer is not constitutionally entitled to use immunity merely by virtue of the filing of his federal income tax return. This conclusion is supported by the practical necessities of tax administration and criminal law enforcement. If all disclosures made on federal income tax returns, and their fruits, were automatically immune from nontax prosecutorial use, special procedures would have to be devised to insulate tax from nontax investigations and prosecutions, and evidence of nontax criminal activities uncovered in the course of tax investigations might be presumptively immune from prosecutorial use. Use immunity with respect to federal income tax returns should be limited to only a few situations determinable by the government in advance, so that other taxpayers' returns may, as at present, be made available to the Department of Justice or a United States Attorney in proper cases in connection with criminal tax or related nontax investigations.

B. It is, moreover, doubtful whether the requirement that the questions on an income tax return be

answered implicates a taxpayer's Fifth Amendment privilege at all. This Court's decision in *California* v. *Byers,* 402 U.S. 424, suggests that a taxpayer's privilege against self-incrimination may not be available as a basis for refusing to answer the questions on a return.

The standard of incrimination necessary to justify invocation of the privilege against self-incrimination in the criminal context is whether the claimant's response "would furnish a link in the chain of evidence needed to prosecute the claimant for a * * * crime." *Hoffman* v. *United States,* 341 U.S. 479, 486. But in weighing claims of Fifth Amendment privilege, this Court has required a higher showing of incrimination in certain cases arising outside the criminal context, in which the requested disclosure would have served an important nonprosecutorial government interest. See, *e.g., United States* v. *Sullivan,* 274 U.S. 259.

The government has an overriding interest in effective enforcement of its income tax laws, and compelled self-reporting is a necessary part of the enforcement scheme. Moreover, the questions asked on the return are essentially neutral and are addressed to the public at large, rather than to a narrow class of persons engaged in illegal activities, thus contrasting sharply with the reporting schemes struck down in cases such as *Marchetti* v. *United States,* 390 U.S. 39. These considerations point toward the conclusion that a claim of privilege with respect to a federal income tax return should be honored, if at all, only when the disclosures sought would entail a substantial risk of

prosecution. And the disclosures made by petitioner, that he was a professional gambler who derived a substantial income from wagering, entailed no such risk.

II

Any error in the admission into evidence of petitioner's federal income tax returns was harmless beyond a reasonable doubt. Those returns showed only that petitioner was "no stranger to the business of wagering and gambling" (App. 58–59). But petitioner's gambling tendencies were irrelevant to his part in the charged conspiracy; the indictment charged not that petitioner himself placed bets in furtherance of the conspiracy but rather that he supplied his co-conspirators with the information necessary to facilitate their wagering activities. Furthermore, petitioner's gambling tendencies were in any event amply established by other evidence.

III

A. Section 605 of the Communications Act does not bar admission into evidence of telephone toll records produced pursuant to a valid grand jury subpoena. That provision explicitly permits divulgence of communications "in response to a subpoena * * *." Indeed, even apart from the explicit statutory exception, it seems clear that divulgence of toll records as such is not barred by the statute at all.

B. The racing charts kept by the California Horse Racing Board were admissible under the Business Records Act. Those charts were made by an agent of

the Board in the regular course of the Board's business, and petitioner offered no evidence that the charts were unreliable. The Act is not unconstitutional merely because it provides an exception to the hearsay rule. Cf. *Dutton* v. *Evans,* 400 U.S. 74.

ARGUMENT

I

A TAXPAYER WHO FAILS TO ASSERT HIS PRIVILEGE AGAINST SELF-INCRIMINATION AT THE TIME OF FILING HIS FEDERAL INCOME TAX RETURN MAY NOT SUBSEQUENTLY INVOKE THAT PRIVILEGE AS A BAR TO THE USE OF HIS RETURN IN A CRIMINAL PROSECUTION

The principal issue in this case is whether petitioner's federal income tax returns for the years 1965, 1966, and 1967 were admissible against him in this prosecution for conspiring to violate federal gambling laws.[6] In considering this issue, both the majority and the dissenters in the court of appeals *en banc* took as their starting point the assumption that the requirement, imposed by Sections 6011(a) and 6012(a) of the Internal Revenue Code of 1954, 26 U.S.C. 6011(a) and 6012(a), that a taxpayer answer the questions on a federal income tax return implicates the privilege against self-incrimination in the same manner and to the same extent as does, for example, the require-

[6] Neither petitioner nor the minority in the court of appeals *en banc* has suggested that a taxpayer would be entitled to immunity from use of his returns in a criminal tax prosecution. See *Mackey* v. *United States,* 401 U.S. 667, 703–711 (concurring opinion of Mr. Justice Brennan); Note, 86 Harv. L. Rev. 914 915, n. 7 (1973).

ment that a witness furnish responsive testimony at a civil trial. We discuss the soundness of that assumption below (pp. 27–41, *infra*). But for purposes of our main argument (pp. 12–27, *infra*), we assume with the court of appeals that petitioner's privilege against self-incrimination was implicated by the requirement that he answer the questions on his returns and that he would have been entitled, at the times the returns were filed, to assert the privilege as a basis for refusing to make any incriminating disclosures.[7]

A. FAILURE TO ASSERT THE PRIVILEGE AT THE TIME OF FILING PRECLUDES ANY SUBSEQUENT INVOCATION OF THE PRIVILEGE AT TRIAL

Our contention here is that the filing by petitioner of fully completed returns, without any assertion of the privilege at the time of filing, precluded any subsequent claim of immunity with respect to the disclosures actually made on the returns. This is the rule that has been applied by all courts of appeals that have considered the question. See *Pauldino* v.

[7] But we make that assumption only with respect to the questions relating to petitioner's occupation and the source of his income. The amount of petitioner's income, whatever its source, was not privileged from disclosure. As Mr. Justice Holmes stated for the Court in *United States* v. *Sullivan*, 274 U.S. 259, 263–264:

> It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.

Subsequent decisions of this Court have reaffirmed that a taxpayer has no right to refuse to disclose to the revenue authorities the amount of his illegal gains. *James* v. *United States*, 366 U.S. 213; *Rutkin* v. *United States*, 343 U.S. 130.

United States, 500 F. 2d 1369 (C.A. 10); *Grimes* v. *United States*, 379 F. 2d 791 (C.A. 5), certiorari denied, 389 U.S. 846; *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9); *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574. Cf. *United States* v. *Smith*, 484 F. 2d 8 (C.A. 10), certiorari denied, 415 U.S. 978; *United States* v. *Silverman*, 449 F. 2d 1341 (C.A. 2), certiorari denied, 405 U.S. 918. This rule simply constitutes a specific application of the more general principle that the privilege against self-incrimination "is not a self-executing mechanism; it can be * * * lost by not asserting it in a timely fashion." *Maness* v. *Meyers*, 419 U.S. 449, 466.

1. *Petitioner's voluntary disclosures were not compelled in the manner protected against by the Fifth Amendment.*

The court below properly analogized the preparation and filing of an income tax return to the giving of testimony in a civil proceeding (Pet. App. A, p. 5):

> Assume [petitioner] had witnessed an automobile accident in the parking lot of Pomona Fairgrounds on September 25, 1968. If he had been subpoenaed as a witness in a civil trial concerning the accident and had testified that he was there and saw everything, those admissions could have been used in his conspiracy trial to prove that he was at the race track on the day when the first race was allegedly fixed. His privilege would be unavailable because he had failed to assert it during the civil trial. At the civil trial, he was subpoenaed to testify by the power of the court; and he could have been

> awed by the direction of the judge to answer the questions. But if he failed to assert his privilege and proceeded to testify, his answers could be used against him. His failure to invoke his privilege in his tax returns produces a similar result.

a. The court of appeals' premise—that, at least as a general matter, testimony given in a civil proceeding may be used against the witness in a subsequent criminal prosecution—is supported by a long line of decisions in this Court. See, *e.g., United States* v. *Kordel,* 397 U.S. 1, 10; *Vajtauer* v. *Comissioner of Immigration,* 273 U.S. 103, 113. A similar rule also applies to testimony given before a grand jury (see, *e.g., Rogers* v. *United States,* 340 U.S. 367; *United States* v. *Monia,* 317 U.S. 424, 427)[8] and to information supplied in response to an administrative summons (see *e.g., United States* v. *Murdock,* 284 U.S. 141, 148).

Some of the earlier decisions articulating and applying this rule explain it as being grounded in a theory of implied waiver. See, *e.g., United States* v. *Murdock, supra,* 284 U.S. at 148 (the witness's privilege "is deemed waived unless invoked"). But later decisions have correctly pointed out that a witness's previous testimony in a civil proceeding or before a grand jury is admissible against him in a subsequent prosecution because that testimony was not "compelled" in a manner protected against by the Fifth Amend-

[8] But see *United States* v. *Mandujano,* No. 74-754, writ of certiorari granted March 24, 1975 (involving the testimony of "putative defendants" before a grand jury).

ment. Thus in *United States* v. *Monia, supra,* 317 U.S. at 427, the Court observed:

> The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.[9]

The requirement of express assertion of the privilege pertains even though a witness in a civil proceeding or before a grand jury is ordinarily subject to some compulsion to testify: he often will have been summoned by legal process to appear and give testimony; he takes an oath that he will tell the "whole truth"; and the judge may inform him, if necessary, that he has a duty as a citizen to provide evidence and may not refuse to do so on mere whim. But the mild coercion to which any witness is thereby subjected does not, under the decisions of this Court, constitute a basis for subsequent "retroactive" invocation of the Fifth Amendment privilege. "The duty to tell the facts when called as a witness, and to tell them truly under the compulsion of an oath does not constitute what is said a forced admission when no reluctance is made known." *Shushan* v. *United States, supra,* 117 F. 2d at 117.

Accordingly, more recent cases involving the question whether a particular witness's testimony may be

[9] The argument by the dissenters below (Pet. App. A, pp. 42-43) that petitioner cannot be deemed to have "waived" his privilege is therefore inapposite.

used against him in a subsequent criminal prosecution have focused upon whether the witness, when testifying, was subject to some more compelling form of testimonial coercion. Where such coercion has been found, the Court has concluded that the testimony thus compelled, even though given without any contemporaneous claim of privilege, is immune from subsequent prosecutorial use against the witness. See *Lefkowitz* v. *Turley,* 414 U.S. 70 (loss of government contracts); *Garrity* v. *New Jersey,* 385 U.S. 493 (loss of government employment). On the other hand, in the absence of some special or unusual compulsion to speak, the prosecution's right to utilize a defendant's previous statement will be recognized. See *United States* v. *Kordel, supra.* Cf. *Michigan* v. *Tucker,* 417 U.S. 433; *Couch* v. *United States,* 409 U.S. 322.

b. The instances are sharply limited in which an individual may be excused from the requirement that he claim his privilege in order to avoid subsequent characterization of his disclosures as uncompelled. They appear to be confined to two basic categories, and a taxpayer completing his federal income tax return clearly does not come within either of them.[10] The first category consists of persons in police custody who make statements during incommunicado interrogation without advice and waiver of rights. See *Miranda* v. *Arizona,* 384 U.S. 436. Even though such individuals have not affirmatively asserted any claim

[10] We discuss below (pp. 20–22, *infra*) a third, very narrow, category of cases in which use immunity may attach to disclosures made without any contemporaneous assertion of the privilege.

of privilege, they can preclude use of their statements in the prosecution's direct case if *Miranda*'s prophylactic requirements have not been observed. But even a brief glimpse at the *Miranda* opinion reveals how different the situation of a taxpayer filling out his income tax return in the privacy of his own home or office is from the circumstances that so concerned the Court in the case of incommunicado police interrogation. The latter situation was found by the Court to entail substantial risks of resort by police to "third degree" tactics or other means to "persuade, trick, or cajole [a suspect] out of exercising his constitutional rights" (384 U.S. at 455), with the conduct of the police often not effectively subject to judicial scrutiny because of the incommunicado nature of the interrogation.

The second category consists of persons like those questioned in *Turley* or *Garrity,* who have been called to testify in proceedings inquiring into suspected illegal activities. The salient feature of these cases is that the individuals involved have been directly and explicitly threatened with substantial punitive action in response to any invocation of the privilege or refusal to waive immunity from prosecutive use of their testimony. Nothing remotely similar confronts a taxpayer completing his federal income tax return.

A taxpayer is not subjected to any undue pressures designed to coerce him to forego a valid claim of privilege. Unlike the circumstances in either *Miranda* or *Garrity,* for example, a taxpayer is not confronted with significant physical or psychological coercion to

provide self-incriminatory information. To the contrary, as we now show, the taxpayer, at the time of completing and filing his return, is in a situation that is inherently less coercive even than that of a witness who has been called to testify in a civil proceeding.

c. This Court's decision in *Miranda* focused in large part upon the perceived coerciveness of the setting in which the self-incriminating disclosures were made. But as we have already indicated (p. 16, *supra*), that kind of coerciveness is absent here. In *Turley* and *Garrity* the Court was concerned with a different kind of coercion—the official imposition of some form of penalty or sanction for the assertion even of a valid claim of privilege. That kind of coercion also is lacking here. A taxpayer is faced with no threat, express or implied, of a penalty for asserting a claim of privilege. And, as we now explain, the mechanics that would be brought into play upon a taxpayer's assertion of a claim of privilege closely resemble those that operate in the context of a civil trial and are not themselves improperly coercive.

If a taxpayer asserts his privilege against self-incrimination as a basis for refusing to answer a question on his return, the Internal Revenue Service may proceed in either or both of two ways. First, the Service may proceed administratively to complete the taxpayer's return. See Section 6020(b) of the Internal Revenue Code. In connection with the preparation of the taxpayer's return, the Service is empowered to summon the taxpayer "to appear before the Secretary or his delegate at a time and place named in the sum-

mons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such ~~inquiry~~ * * * inquiry Section 7602(2) of the Code. If the taxpayer refuses to comply with the summons, the Service may sue for enforcement.[11] See Section 7604 of the Code. If the judge sitting on the summons enforcement proceeding upholds the taxpayer's claim of privilege and therefore refuses to enforce the summons, the taxpayer is in the same protected position as the witness who is excused from testifying on grounds of privilege. If the judge denies the claim of privilege and orders the summons enforced, the taxpayer may appeal from that order. Only if a stay pending appeal is denied does the taxpayer stand in the disadvantageous position of a witness whose claim of privilege has been denied, *i.e.*, of being forced to choose between, on the one hand, making the requested disclosures and, on the other, asserting his claim of privilege on appeal as a defense against an order holding him in contempt.[12]

Second, the Internal Revenue Service may seek to have the taxpayer criminally prosecuted for willful failure to file a return, in violation of Section 7203 of the Code. But the willfulness requirement of Sec-

[11] While this has not ordinarily been the practice, 18 U.S.C. 6004 apparently empowers the Service, with the approval of the Attorney General, to grant use immunity to the taxpayer and thereupon compel a response.

[12] A disclosure made under such circumstances might be protected by constructive use immunity against later use in a criminal prosecution. See *Maness* v. *Meyers*, *supra*, 419 U.S. at 474 (concurring opinion of Mr. Justice White).

tion 7203 imposes upon the government the burden of proving that the taxpayer committed "a voluntary, intentional violation of a known legal duty." *United States* v. *Bishop,* 412 U.S. 346, 360. Accordingly, a prosecution of a taxpayer under Section 7203, for a failure to answer questions on his return relating to his occupation or the source of his income (see note 7, *supra*), can succeed only where the government establishes beyond a reasonable doubt not merely that the taxpayer's claim of privilege was unfounded in law but also that it was made in bad faith. See, *e.g., United States* v. *Porth,* 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824 (taxpayer's refusal to complete his return "grew out of his long-time dislike for the taxing and money systems of the United States"); *United States* v. *Daly,* 481 F. 2d 28, 30 (C.A. 8), certiorari denied, 414 U.S. 1064 (taxpayer "made no reasonable showing with respect to how the disclosure * * * could possibly incriminate him"). Thus a taxpayer who erroneously but in good faith relies upon his privilege as a basis for refusing to answer such questions is not subject to conviction under Section 7203. In contrast, a witness who erroneously but in good faith refuses to testify on grounds of privilege may be imprisoned for contempt. See, *e.g., Uphaus* v. *Wyman,* 360 U.S. 72. Cf. *Howat* v. *Kansas,* 258 U.S. 181; *Worden* v. *Searls,* 121 U.S. 14.

In short, the sanctions to which a taxpayer may be subjected on account of the assertion of the Fifth Amendment privilege as a reason for refusing to answer a question on his return are both less immediate

and less severe than those that may be visited upon a recalcitrant witness. Accordingly, a taxpayer, at the time of preparing and filing his income tax return, is not subject to testimonial coercion amounting to compulsion under the Fifth Amendment. There is, therefore, no constitutional basis for barring prosecutorial use of the disclosures made on a taxpayer's return.

d. Unlike the minority below (Pet. App. A, pp. 15–17, 42), we do not believe that this Court's decision in *Mackey* v. *United States, supra,* requires a different result. Indeed, the holding in *Mackey*—that a defendant's previous gambling excise tax returns were admissible against him in a trial for income tax evasion—is fully consistent with our contention here. Cf. *United States* v. *Knox,* 396 U.S. 77. It is true that a majority of the Court indicated that a different rule would apply to criminal trials that took place after the date of the decisions in *Marchetti* v. *United States,* 390 U.S. 39[illegible], and *Grosso* v. *United States,* 390 U.S. 62, *i.e.,* that disclosures made in compliance with the registration and excise tax reporting requirements at issue in those cases would be immune from prosecutorial use from and after the date of their decisions. 401 U.S. at 672 (plurality opinion of Mr. Justice White), 710–711 (concurring opinion of Mr. Justice Brennan), and 713–714 (dissenting opinion of Mr. Justice Douglas). See also *United States* v. *Lookretis,* 398 F. 2d 64 (C.A. 7). But we believe that the rule thereby made applicable to the disclosure produced by those regis-

tration and excise tax requirements—a rule that has no exact counterpart with respect to testimony elicited in civil or regulatory proceedings or given before grand juries—stems from the unusual fact that those requirements, because directed at individuals inherently suspect of criminal activities and designed to elicit disclosures concerning those individuals' activities in an area permeated by criminal statutes, imposed such substantial risks of self-incrimination that the entire statutory scheme was held "to be unenforceable." 401 U.S. at 672 (plurality opinion of Mr. Justice White). In view of that fact, it would have been anomalous to have permitted the government to give force to the scheme through prosecutorial use of the disclosures it had produced. Cf. *United States* v. *United States Coin & Currency,* 401 U.S. 715. No similar anomaly would arise upon prosecutorial use of petitioner's disclosures here. The income tax statutes are concededly valid and enforceable, and there is no apparent reason why an incidentally incriminating disclosure voluntarily made on an income tax return should automatically be placed beyond legitimate prosecutorial inquiries.

2. *A rule conferring automatic use immunity on information supplied on tax returns would seriously impede enforcement of both tax and non-tax laws.*

It is important that use immunity, if any, with respect to federal income tax returns be limited to a few situations or cases determinable by the government in advance, so that in all other cases returns may, as

at present, be made available to the Department of Justice and the United States Attorneys in proper cases in connection with criminal tax, and related nontax, investigations. A rule that confers use immunity upon every item on every taxpayer's return (*i.e.*, the rule for which petitioner contends here), would intolerably interfere both with effective criminal enforcement of the revenue laws and with legitimate prosecutorial inquiries into nontax offenses as well.[13]

In the usual criminal tax case, the Internal Revenue Service conducts the criminal tax investigation but then refers the matter to the Department of Justice or a United States Attorney for prosecution. This

[13] It is, we believe, fair to characterize petitioner and the dissent below as urging adoption of a doctrine of automatic use immunity. But recognition of an automatic use immunity would not be appropriate even if the approach we recommend, which requires the taxpayer to assert his privilege at the time of filing his return, were to be rejected. A compelled disclosure violates the privilege against self-incrimination only if the disclosure is incriminating at the time it is made. A taxpayer has no right to shield a disclosure that was innocent when made, merely because the disclosure later became incriminating in light of the taxpayer's subsequent criminal activities. The privilege against self-incrimination does not "suppl[y] insulation for a career of crime about to be launched." *United States* v. *Freed*, 401 U.S. 601, 607. Accordingly, even if a taxpayer is to be permitted to invoke the privilege for the first time at trial, he should be required to establish not only that the previous disclosure now has a potential for incrimination, but also that it had that potential when made. In this case, for example, petitioner would be required to show that the disclosures made on his 1965, 1966, and 1967 income tax returns were incriminating as of the dates on which those returns were filed and not merely that they became incriminating in the context of a prosecution for a conspiracy all overt acts of which occurred later, between May 1968 and April 1969 (C.R. 42–45).

process would become fraught with difficulty if the rule urged upon the Court by petitioner were to be adopted. If the taxpayer's return is received by the government subject to immunity from all nontax prosecutorial use, the referral of his case for prosecution would confront the prosecutor with a serious dilemma in those situations in which the taxpayer also is under investigation in connection with suspected nontax offenses. Obviously the prosecutor must at least review the case that the Internal Revenue Service has developed to determine whether it merits prosecution. But once he does that, he has incurred the heavy burden of proving, in any subsequent nontax prosecution of the taxpayer, that none of the government's evidence was derived from the taxpayer's return. See *Kastigar* v. *United States,* 406 U.S. 441; *Counselman* v. *Hitchcock,* 142 U.S. 547. Of course, procedures could be devised to attempt to insulate tax from nontax prosecutions. But they do not now exist, and they would inevitably be burdensome.

By the same token, under a rule of automatic use immunity, evidence of nontax criminal activities uncovered by the Service in the course of a tax investigation would be presumptively immune from prosecutorial use, whether or not the tax case itself were referred for prosecution, as a "fruit" of information provided on the return. As a corollary, prosecutors who discover evidence of tax offenses in the course of nontax investigations may be made reluctant to confer with revenue agents concerning the criminal tax implications of such evidence, if such contacts would subject their nontax prosecutions to charges of taint.

Furthermore, a rule of automatic use immunity would put an end to the coordination of tax and nontax investigations. At present the Department of Justice and United States Attorneys, by regulation, have the right to inspect a taxpayer's return "where necessary in the performance of * * * official duties." Section 301.6103(a)-1(g) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6103(a)-1(g). This right is commonly exercised in the course of nontax criminal investigations of individuals suspected of participating in organized criminal activities and of public officials suspected of corruption. The purpose of the inspection ordinarily is to determine whether the taxpayer failed to report the income produced by the illegal transactions that were uncovered during the course of the nontax investigation, *i.e.,* whether the individual has committed tax as well as nontax offenses.[14] As a result of this procedure, nontax investigations into organized crime or official corruption frequently give rise to tax investigations and prosecutions as well. See, *e.g., Kerner* v. *United States,* 493 F. 2d 1124 (C.A. 7), certiorari denied, 417 U.S. 976. A rule of automatic use immunity would, as a practical matter, prevent a prosecutor from inspecting the tax returns of an

[14] Of course, the individual's return could corroborate the evidence of nontax offenses, as where, for example, the illegal income was in fact reported on the return. But this is probably little more than a theoretical possibility. The world being as it is, in the usual case it may be anticipated that the taxpayer will illegally fail to report his illegal income. Cf. Bittker, *Taxing Income From Unlawful Activities*, 25 Case-West. Res. L. Rev. 130, 139 (1974).

individual being investigated in connection with suspected nontax offenses, for, as we have already stated, once the prosecutor had inspected the return, any subsequent nontax prosecution would bear the onerous burden of proving that the government's case was free of taint. It can be anticipated that few prosecutors would voluntarily assume that burden. It would thus become infeasible to attempt to prosecute a taxpayer for both tax and nontax offenses in the same proceeding.[15]

The government has a "legitimate prosecutorial interest in using independently obtained evidence to enforce its [nontax] criminal laws unhindered by the burden of proving that it is not making use of information gathered pursuant to a nonprosecutorial regulatory scheme." Note, *supra*, 86 Harv. L. Rev. at 918. At the same time, the government also has an obvious and substantial interest in efficient administration of the income tax laws, including full and effective enforcement of their civil and criminal sanctions. Both these interests would be impaired by the rule of automatic use immunity for which petitioner and the minority in the court of appeals *en banc* contend, for that rule would halt the free flow of information between agencies that is necessary to efficient and vigorous enforcement of the law, even though the taxpayer has made no assertion of any privilege

[15] The problems discussed above could be significantly ameliorated if the immunity conferred upon disclosures contained in tax returns were limited to direct use of the returns as evidence and did not extend to derivative use. It is at least questionable, however, whether this Court's decisions in *Counselman* and *Kastigar* leave room for such an approach.

respecting the information he has uncomplainingly supplied.

The Fifth Amendment does not impose a rule of automatic use immunity in the circumstances of this case; it confers an immunity from use only with regard to disclosures made as a result of testimonial compulsion, which, as we have shown, is absent in connection with the simple act of filing a federal income tax return. We submit, therefore, that a taxpayer is not constitutionally entitled to use immunity merely by virtue of the filing of his federal income tax return. In order to preserve his Fifth Amendment privilege, a taxpayer must assert it at the time of filing his return as a reason for refusing to make any incriminating disclosures. The Internal Revenue Service could then determine whether the importance of the disclosures sought justified a limited grant of immunity. Special procedures could be followed with respect to those returns that contained information that had been elicited by a grant of immunity, in order to ensure that they would not taint any nontax prosecution. All other returns would remain, as now, available for all legitimate investigatory and prosecutorial purposes.[16]

B. IT IS DOUBTFUL WHETHER THE PRIVILEGE AGAINST SELF-INCRIMINATION MAY BE ASSERTED AS A BASIS FOR REFUSING TO ANSWER THE QUESTIONS ON A FEDERAL INCOME TAX RETURN

The arguments set forth in the preceding section were advanced in the context of an assumption that

[16] Congress may, of course, deem it advisable to impose further restrictions on access to and use of tax returns for nontax purposes, but the imposition of such restrictions is a matter appropriately left to legislative discretion; it is not constitutionally required.

petitioner's privilege against self-incrimination was implicated by the requirement that he answer the questions on his federal income tax return, *i.e.*, that he would have been entitled, at the times of filing those returns, to assert that privilege as a basis for refusing to make any incriminating disclosures. There need be no inquiry into the correctness of that assumption if the Court concurs with our principal contention, which is that a taxpayer's failure to assert any privilege at the time of filing subjects all the disclosures on his return to possible prosecutorial use. But before the Court could decide, to the contrary, that use immunity automatically attaches to the incriminating disclosures made on an income tax return without any claim of privilege, it would be necessary first to determine that a taxpayer's Fifth Amendment privilege is in fact implicated by the requirement that the return be fully completed and filed, for if the privilege is not implicated there is no constitutional basis for imposing use immunity. This Court's decision in *California* v. *Byers*, 402 U.S. 424, is significant in this context: it suggests that a taxpayer's privilege against self-incrimination may not be available as a basis for refusing to answer the questions on a federal income tax return.

Like *California* v. *Byers, supra*, this case raises the question whether the privilege against self-incrimination is implicated by a particular self-reporting scheme that is designed to serve a legitimate, nonprosecutorial governmental interest. The issue in *Byers* was whether the driver of an automobile involved in an accident

could constitutionally be compelled, in the absence of any grant of use immunity, to furnish his name and address and the fact of his involvement. This Court held that a driver could be compelled to comply with the California self-reporting requirements and that the information he furnished could be used against him in a subsequent criminal prosecution, *i.e.*, that the California "hit and run" statute did not implicate the privilege against self-incrimination.[17]

The plurality opinion in *Byers* determined that the disclosures required by the California statute "do not entail the kind of substantial risk of self-incrimination" (402 U.S. at 431) against which the privilege is directed.[18] In a concurring opinion, Mr. Justice Harlan reasoned that although such disclosures might in fact entail a substantial personal risk of self-incrimination in some circumstances, that consideration was outweighed by the significant nonprosecutorial interests that were furthered by the self-reporting scheme and by the importance of not impairing "the Government's capacity to utilize self-reporting schemes * * *

[17] The dissenters below incorrectly read *Byers* as not reaching the question "whether any of the information derived after the stop may be introduced at a criminal trial" (Pet. App. A, p. 36). The Supreme Court of California had upheld the statute's compulsory reporting requirement by recognizing such a restriction, which it considered an essential precondition to sustaining the statute's constitutionality. However, a majority of this Court expressly sustained the constitutionality of the California statute without a use restriction. See 402 U.S. at 427, 458.

[18] The plurality also determined that the information requested under the California statute was not testimonial and so was, in any event, outside the scope of the privilege. 402 U.S. at 431–434.

by the necessary presumption that evidence used in a prosecution after the individual discloses his relationship to the regulated transaction would not have been available if the individual had not complied with the statute" (402 U.S. at 443). As we now show, these lines of reasoning would support a conclusion that, at least in the circumstances of this case, the self-reporting requirements of the federal income tax laws, like those of the California "hit and run" statute, do not implicate the privilege against self-incrimination.

1. The text of the Fifth Amendment from which the privilege against self-incrimination is derived reads as follows:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

As the constitutional text suggests, the core of the privilege's applicability is in the criminal context, *i.e.*, custodial interrogation and testimony before grand juries and at trial. See, *e.g.*, *Bram* v. *United States*, 168 U.S. 532; *Counselman* v. *Hitchcock*, *supra*. The standard of incrimination necessary to implicate the privilege in the criminal context is whether the claimant's response "would furnish a link in the chain of evidence needed to prosecute the claimant for a * * * crime." *Hoffman* v. *United States* 341 U.S. 479, 486.

Before as well as after *Hoffman*, the standard of incrimination that it defined had been applied outside the criminal context as well. See, *e.g.*, *Quinn* v. *United States*, 349 U.S. 155 (testimony before legislative committees); *McCarthy* v. *Arndstein*, 266 U.S.

34 (testimony in civil proceedings); *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447 (testimony before regulatory agencies).

But the *Hoffman* standard is not invariably applicable in testing claims of privilege outside the criminal context. As one commentator on the *Byers* decision observed (Note, 85 Harv. L. Rev. 269, 271–272 (1971); footnotes omitted):

> Where the government's alleged nonprosecutorial interest [has] appeared legitimate and important, the Court [has] balked at applying the definition of "incriminating" developed in the criminal context by *Hoffman* v. *United States*, a definition under which the amendment's protections are triggered merely by the existence of "real" as opposed to purely "imaginary" risks of self-incrimination. Thus, in *United States* v. *Sullivan*, the Court rejected a criminal taxpayer's well-founded claim that even the simple filing of an income tax return was "incriminating" in that a completed return would evidence the amount of his criminal gains while a blank return would arouse official curiosity and investigation. And in *Shapiro* v. *United States*, where the Court was faced with a self-reporting scheme essential to a government attempt to control wartime inflation, it simply ignored the fact that the required disclosures were "incriminating" under the *Hoffman* standard and held the privilege inapplicable * * * [under] the "required records" doctrine * * *.

Thus the threshold level of incrimination required for invocation of the Fifth Amendment privilege does

not remain constant over the spectrum of the privilege's potential applicability: cases arising outside the criminal context, in which the requested disclosure will serve an important, nonprosecutorial governmental interest, are, in some circumstances, treated differently from cases arising within the criminal context. There is, of course, no constitutional anomaly in this disparity in the treatment of the two classes of cases. Cases arising within the criminal context are at the core of the area of protection promised by the constitutional text. As the particular facts giving rise to a claim of privilege become increasingly further removed from that area of protection, it becomes proper to accord increasing weight to the countervailing principles or policies that may be in competition with the principle underlying the privilege against self-incrimination. Cf. Grey, *Do We Have An Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975).

We do not dispute that petitioner's answers on his income tax returns were "incriminating" under the *Hoffman* standard. For example, his admission that his occupation was that of a "professional gambler" furnished a link (albeit a weak one) in the chain of evidence needed to prosecute him for transmitting wagering information in violation of 18 U.S.C. 1084 (an offense the commission of which petitioner was acquitted). We question, however, whether the *Hoffman* standard is applicable here at all. The *Hoffman* standard permits invocation of the privilege upon the mere possibility of incrimination. But, as the plurality noted in *Byers,* "the mere possibility of incrimination

is insufficient to defeat the strong policies in favor of a disclosure called for by statutes [that further significant nonprosecutorial government interests]" (402 U.S. at 428).

2. The nonprosecutorial governmental interests of the federal income tax laws are manifestly more important than those furthered by the California "hit and run" statute at issue in *Byers.* This point is so obvious that it need not be belabored. An efficient revenue system is the staff of life for any modern government, and the income tax is the federal government's principal source of revenue.[19]

It is also self-evident that compelled self-reporting is a necessary part of any effective scheme for the determination of individual income tax liabilities. As this Court recently noted, "the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *United States* v. *Bisceglia,* 420 U.S. 141, 145. Even merely sporadic refusals to disclose the information requested on federal income tax forms would impair the government's revenue collection; widespread refusals could lead to a breakdown of the taxing system.

In these circumstances, the government's need for information weighs heavily. It arguably outweighs the individual's interest, protected under the *Hoffman*

[19] In fiscal year 1974, the personal income tax accounted for 43.7 percent of all federal budget receipts, and the corporation income tax accounted for an additional 15.9 percent. Department of Commerce, *Statistical Abstract of the United States, 1974,* p. 221.

standard, of avoiding disclosures that create even a mere possibility of prosecution. To allow invocation of the privilege, on the basis of the comparatively permissive *Hoffman* standard, as a reason for refusing to answer standard questions posed on the federal income tax return, might create the risk of an intolerable interference with the government's interest in prompt and efficient tax collection.[20] These considerations point toward the conclusion that a claim of privilege with respect to a federal income tax return should be honored, if at all, only when the disclosures sought would entail a substantial risk of prosecution. Indeed, it seems clear from the plurality opinion in *Byers* that the income tax self-reporting requirement was one of the examples in mind when it recognized that some situations might justify utilization of a higher threshold of incrimination (402 U.S. at 427–428).

3. The disclosures requested from petitioner did not entail a substantial risk of prosecution. The ques-

[20] This view is consistent with *United States* v. *Sullivan*, *supra*, where this Court held that the possibility of incrimination did not justify a failure to complete a return. Mr. Justic Holmes, writing for the Court, suggested in *Sullivan* that the privilege against self-incrimination might in some circumstances justify a refusal to answer specific questions on a return (274 U.S. at 263):

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld.

The Court did not, however, express any view as to the standard of incrimination that would apply to such a claim of privilege. And see *California* v. *Byers*, *supra*, 402 U.S. at 434, n. 6.

tions with respect to which petitioner retrospectively asserted a claim of privilege at trial concerned only his occupation, his income, and the source of that income. Those questions were not designed to elicit incriminating admissions; they were neutral on their face and directed at the public at large; and they were designed to further the legitimate nonprosecutorial goals of securing and verifying the information necessary for an accurate determination of tax liability. Nor were petitioner's answers self-evidently incriminating. Neither his description of his occupation as that of a "professional gambler" nor his statement that he derived a substantial income from gambling constituted an admission of having engaged in unlawful activity. Various forms of gambling are lawful in many states, and nothing disclosed by petitioner on his return indicated that he had violated any state or federal law.

Accordingly, the privilege against self-incrimination arguably was not implicated by the questions petitioner was called upon to answer on his federal income tax returns. If this is the case, the disclosures that petitioner made could have been compelled without any accompanying grant of use immunity. *California* v. *Byers*, *supra*. A *fortiori* he would not be entitled to actual use immunity at a subsequent trial.

4. In suggesting this line of reasoning, we are not unmindful of the fact that in certain other circumstances involving questioning principally designed to further nonprosecutorial governmental interests, such as testimony in civil proceedings or before legislative

or regulatory bodies, the *Hoffman* standard of incrimination determines whether the privilege may be invoked. See p. 30, *supra*. But there are important differences between inquiries that are directed to a specific individual in a public forum and neutral questions that are addressed to the public at large as part of a vast, national self-reporting scheme. A question formally addressed to a specific individual in a public forum is asked in a context that highlights any incriminating implications of the response and therefore enhances the risk of criminal investigation. In that context, an answer that meets the *Hoffman* standard of incrimination perhaps can fairly be said to entail a significant probability of prosecution. The same cannot be said of answers to neutral questions on a self-reporting form that must be completed by all taxpayers. Those answers, which are furnished "in the quiet of one's home" (Pet. App. A, p. 7), are not accessible to the public. See Section 301.6103(a) of the Treasury Regulations on Procedure and Administration, 26 C.F.R. 301.6103(a). They therefore escape the public scrutiny to which statements made in less private settings are subjected. Moreover, official scrutiny of the disclosures on income tax returns will, in all but unusual cases, focus solely upon revenue implications, with little or no consideration likely to be given to any possibly incriminating implications of answers that do not suggest criminality on their face.

In short, the individual's real interest in avoiding the necessity of giving a possibly incriminating response is considerably weaker where the question has been addressed to him merely in his capacity as a member of a large class of individuals who are subject to neutral self-reporting requirements than where he has been singled out to answer it and must do so in a public forum. In the former context, the government's substantial interest in enforcing such self-reporting requirements without the interference, delay, or outright obstruction that might be occasioned by the easy availability of claims of privilege could reasonably be held paramount.

5. It should be clear that nothing we say here is inconsistent with this Court's *Albertson-Marchetti* line of cases.[21] In those cases, the Court held that the privilege against self-incrimination could be invoked as a reason for refusing to comply with governmental registration requirements directed at Communist Party members, gamblers, and owners of illegal firearms. In so holding, the Court explicitly distinguished such registration requirements from the reporting requirements that the income tax laws impose generally upon all taxpayers. In *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79, the Court noted:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not

[21] *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70; *Marchetti* v. *United States*, *supra; Grosso* v. *United States*, *supra; Haynes* v. *United States*, 390 U.S. 85.

> asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.

Similarly, in *Haynes* v. *United States, supra,* 390 U.S. at 98–99, the Court observed:

> * * * [T]hese [firearms registration] provisions, as now written, cannot be brought within any of the situations in which the Court has held that the constitutional privilege does not prevent the use by the United States of information obtained in connection with regulatory programs of general application. See *United States* v. *Sullivan*, 274 U.S. 259; *Shapiro* v. *United States,* 335 U.S. 1. * * * The questions propounded by [the firearms registration statute], like those at issue in *Albertson* * * *, are "directed at a highly selective group inherently suspect of criminal activities"; they concern, not "an essentially non-criminal and regulatory area of inquiry," but "an area permeated with criminal statutes."

See also *Marchetti* v. *United States, supra,* 390 U.S. at 47–49.

The Court's evident concern with the registration and excise tax requirements in the *Albertson-Marchetti* cases was that the disclosures they required would entail a substantial risk of prosecution. As the Court stated in *Grosso* v. *United States, supra,* 390 U.S. at 67, "unlike the income tax return at issue in *United States* v. *Sullivan,* 274 U.S. 259, petitioner's

> submission of [a wagering] excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him." Replies to the neutral questions on a federal income tax return do not subject the taxpayer to the analogous risk of prosecution; at least except where such replies themselves constitute a direct admission of criminality [22]—a situation not presented by the facts of this case—they do not have "the direct and unmistakable consequence of incriminating * * *." *Marchetti* v. *United States, supra,* 390 U.S. at 49.

It is true that petitioner's disclosure that his occupation was that of a "professional gambler" revealed that his livelihood was gained in an area "permeated with criminal statutes." But this disclosure did not entail a substantial risk of prosecution "in the setting in which [the question was] asked * * *." *Hoffman* v. *United States, supra,* 341 U.S. at 486. The self-reporting requirements of the income tax statutes are directed at the public at large, rather than at "a highly selective group inherently suspect of criminal activities," are imposed exclusively for legitimate revenue-raising purposes, and are not designed to serve secondary prosecutorial purposes.

[22] The only questions on a federal income tax return that would appear to have a substantial potential for eliciting a direct admission of criminality are the ones that request the taxpayer to state his occupation and the source of miscellaneous income. The evident purpose of those questions is nonprosecutorial, *i.e.*, to secure information that will assist in verifying the correctness of the amount of income reported.

Although the income tax laws, like "the California Vehicle Code[,] defines some criminal offenses, [those laws are] essentially regulatory, not criminal." *California* v. *Byers, supra,* 402 U.S. at 430. By contrast, the registration requirements at issue in the *Albertson-Marchetti* cases self-evidently served a significant, if secondary, prosecutorial purpose. It could be anticipated that the disclosures sought by those requirements would be scrutinized for incriminating admissions. See, *e.g., Marchetti* v. *United States, supra,* 390 U.S. at 47. Thus any such disclosure, even if it involved only the mere possibility of incrimination, entailed a significant risk of criminal investigation and prosecution. The same is not true of disclosures on income tax returns, which are ordinarily reviewed exclusively for their bearing upon the amount of income tax due from the taxpayer.

In short, disclosures such as petitioner's, unlike those that had been sought in the *Albertson-Marchetti* cases, would not be likely to give rise to any criminal inquiry or subsequent prosecution. Indeed, the risk of prosecution entailed by petitioner's disclosures would appear to be significantly less than that entailed in compliance by motorists with the "hit and run" statute in *Byers*. That statute applied only to drivers involved in automobile accidents causing property damage, and such drivers are "in fact very likely to have violated one of the hundreds of state criminal statutes regulating automobiles * * *." 402 U.S. at 460 (dissenting opinion of Mr. Justice Black). In contrast, the self-reporting requirements at issue here applied generally to all taxpayers, without any implicit discrimination on the basis of possible involvement in criminal activity.[23]

[23] It is unclear to what extent the result reached in *Byers* depended not only upon the importance of the non-prosecutorial purpose underlying the self-reporting requirements and the nature and size of the class of persons to which the requirement applied, but also upon the damage to governmental interests that would ensue from immunization of the reports from prosecutive use. It appears that the latter factor was accorded considerable weight by Mr. Justice Harlan, who emphasized that a decision unfavorable to the State on either ground—*i.e.*, striking down the reporting requirement or clothing all reports made thereunder with immunity—would seriously impair important public interests (402 U.S. at 443). The State would, by the very nature of the problem it confronted, be forced either to forego the reporting system, with the benefits it could be expected to yield in furthering highway safety and securing fair compensation for accident victims, or to accept a crippling blow to its ability to use criminal prosecutions as a means of enforcing vehicular safety codes, because of the severe difficulties likely to be present in establishing that any prosecution was entirely free of taint derived from the defendant's report of an accident.

If there is to be a principled distinction between *Byers* and the self-reporting requirements of the federal income tax, it must, it seems to us, be predicated upon a judgment that allowance of some form of immunity would not significantly impair the availability of criminal sanctions as a means for enforcing the important societal norms reflected in the federal criminal laws. This was, as a practical matter, impossible in the context of the California statute at issue in *Byers*, since there was no way that a person involved in a reportable accident could assert the privilege without by that very act incurring a significantly enhanced risk of prosecution. An assertion of the privilege by a taxpayer on his return is more feasible; it might accordingly be concluded that a recognition of the privilege in connection with the filing of income tax returns (subject to a power to

Footnote continued on page 42.

II

ANY ERROR IN THE ADMISSION INTO EVIDENCE OF PETITIONER'S FEDERAL INCOME TAX RETURNS WAS HARMLESS

Petitioner was indicted and tried before the jury on two separate counts. The first of these counts charged petitioner's participation in a conspiracy to violate federal gambling laws, in violation of 18 U.S.C. 371. As Judge Wallace noted in his dissent from the original panel decision below, "[t]he gist of the government's evidence and argument was that co-conspirators Lawler and Swank were elaborately betting on selected horses on the basis of information supplied by [petitioner]" (Br. in Opp. App., p. 19).

The second count charged petitioner with the substantive offense of aiding and abetting the unlawful interstate transmission of bets or wagers, in violation of 18 U.S.C. 1084. "[B]eing engaged in the business of betting or wagering" (C.R. 46) is an element of that offense. Petitioner's income tax returns, which indicated that he was a "professional gambler" who received substantial amounts of income from "wagering" or "gambling," apparently were introduced for

Footnote continued from page 41.
compel the information by a grant of immunity, *e.g.*, under 18 U.S.C. 6004) would not be so destructive of important governmental objectives as to override the interests served by allowing a claim of the privilege to be governed by the *Hoffman* standard. Such a conclusion would, of course, be viable only if the Court were to hold with the court of appeals' majority that an express claim of privilege on the return is required to preclude subsequent prosecutorial use of information set forth in the return. See pp. 12–27, *supra*.

the bearing they would have on that element of the offense proscribed by 18 U.S.C. 1084.

At the close of the government's case, the trial court acquitted petitioner of the substantive offense. Thus the tax returns were considered by the jury only with respect to the charge of conspiracy. The returns covered a period (1965–1967) prior to the first overt act of the conspiracy, which was alleged to have occurred on or about May 23, 1968 (C.R. 42). Accordingly, in his closing argument, the prosecutor referred to the returns only as evidence that petitioner was "no stranger to the business of wagering and gambling" (App. 58–59). That use of petitioner's income tax returns "was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18, 24.

First, it is clear, as Judge Wallace pointed out in his opinion dissenting from the panel decision, that petitioner's "gambling tendencies were irrelevant to his part in this particular conspiracy" (Br. in Opp. App., p. 19). The accusation was not that petitioner himself placed bets in furtherance of the conspiracy, but rather that he supplied his co-conspirators with the information necessary to facilitate their wagering activities (*ibid.*). Proof of petitioner's role in the conspiracy was based in large part upon telephone toll records, which revealed a pattern of telephone communications between petitioner and his co-conspirators immediately in advance of each race on which they placed heavy wagers in furtherance of the conspiracy. See, *e.g.,* Tr. 130–131, 1026–1029, 1034

588-588—75——7

(Mister Fourway); 535–536, 548, 1035 (Deerwood Duke); 672–673, 891 (Maretazo II); 168, 895–896 (King Kildare).[24] In addition, the government introduced evidence of co-conspirator Swank's pretrial statement to investigating F.B.I. agents that petitioner was "the best handicapper around the race track and if [petitioner] said he liked a horse, just him saying this [was] enough for Swank to lay several thousand dollars on [the] horse" (Tr. 997). The government also presented evidence that petitioner had received a $1500 payoff from co-conspirator Lawler (Tr. 125–126). It was this evidence—and not the fact, revealed by petitioner's income tax returns, that he was "no stranger to * * * gambling"—that was probative on the issue of guilt on the conspiracy count and must be presumed to have been determinative in the minds of the jurors.

Second, even if petitioner's gambling tendencies had been probative on the issue of guilt, those tendencies were amply established by testimony that, for example, petitioner had placed many personal bets on

[24] "Tr." refers to the eight-volume transcript of trial proceedings. "Mister Fourway", "Deerwood Duke," "Maretazo II," and "King Kildare" were horses on which petitioner's co-conspirators placed or attempted to place wagers after receiving information from petitioner that certain races had been fixed. Other evidence relating to those races is set forth at Tr. 241–242, 289–291, 396–398, 572–574, 709–711, 714, 716, 1019–1023, 1025–1028, 1167–1169 (Mister Fourway); 128–129, 131, 141, 143–A, 144, 148, 155–159, 274, 291–292, 399, 450, 454, 470, 473–479, 497–499, 535–536, 545–550, 723–724, 1029, 1032–1034, 1041, 1044, 1051–1053, 1078, 1184, 1304–1305, 1325 (Deerwood Duke); 162–165, 292–293, 354–356, 491, 493–494, 556, 672–673, 889–891 (Maretazo II); 131, 168–169, 293–294, 892–893, 896 (King Kildare).

horse races (Tr. 122–126) and that he was an excellent handicapper who went to horse races frequently (Tr. 565, 655, 1092). That evidence obviously was more directly related to the kind of gambling involved in this case, *i.e.*, wagering on horse races, than were the more general statements on petitioner's income tax returns. Those returns were, at most, merely cumulative evidence of petitioner's interest in the sporting life.

Accordingly, whether or not this was a "close" case, it is virtually inconceivable that the jury's verdict would have been altered by exclusion of petitioner's tax returns. The harmless error doctrine thus fully justifies affirmance of petitioner's conviction, even if the introduction in evidence of the returns was error of constitutional magnitude.

III

THE OTHER EVIDENCE INTRODUCED AGAINST PETITIONER WAS PROPERLY ADMITTED

Petitioner contends that the telephone toll records were admitted into evidence at trial in violation of Section 605 of the Communications Act of 1934, 47 U.S.C. 605 (Br. 10–21), and that certain racing charts introduced in evidence were not admissible under the Business Records Act, 28 U.S.C. 1732 (Br. 21–24).[25] Neither contention has merit.

[25] The original panel dismissed these and other contentions with the observation that "[n]one of [petitioner's] remaining contentions has merit or is of sufficient substance to warrant discussion" (Br. in Opp. App., p. 18), and they were not further considered by the court of appeals *en banc*. In view of this

Footnote continued on page 46.

A. THE ADMISSION INTO EVIDENCE OF THE TELEPHONE TOLL RECORDS DID NOT VIOLATE SECTION 605 OF THE COMMUNICATIONS ACT

Petitioner invites the Court to decide whether the general language of Section 605 of the Communications Act bars a telephone company from divulging telephone toll records that it keeps in the ordinary course of business for billing and excise tax purposes. The Court need not reach that issue, however, for the divulgence here falls within the statute's specific exception permitting divulgence of communications "in response to a subpoena issued by a court of competent jurisdiction, or * * * on demand of other lawful authority." It is undisputed that the telephone toll records in this case were produced by the telephone company pursuant to a valid grand jury subpoena (App. 34–35; C.R. 202–203, 205).[26] That subpoena satisfied the statutory exception. It need not be decided here whether the subpoena was "a subpoena issued by a court of competent jurisdiction" or, instead, constituted the "demand of other lawful authority." It was clearly one or the other. Technically, the subpoena was "issued by the clerk under the seal of the court." Rule 17(a), Fed. R. Crim. P. This Court noted in *Brown* v. *United States,* 359 U.S. 41, 49:

> [A] grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony * * *.

Footnote continued from page 45.

fact, this Court may wish to exercise its discretion to deny review of these contentions. Cf. *Mishkin* v. *New York*, 383 U.S. 502, 512–514.

[26] Unlike *United States* v. *Miller*, No. 74–1179, certiorari granted, June 9, 1975, this case does not present any question concerning the validity of the subpoena.

See also *United States* v. *Stevens,* 510 F. 2d 1101 (C.A. 5). But whether the subpoena here is characterized as having been issued by the court, or by the clerk or the grand jury as an "other lawful authority," the divulgence of the telephone toll records here was permitted by the express terms of Section 605.

Section 605 should not, in any event, be read as barring divulgence of telephone toll records. The telephone company is required by statute to retain such records for federal excise tax purposes (47 U.S.C. 220), and such records necessarily are also kept in the ordinary course of business for billing purposes. Petitioner's strict reading of Section 605 would bar telephone companies from divulging the toll record, in the form of a bill, to subscribers (because, in many instances, the subscriber would not be within any of the excepted categories of individuals to whom divulgence may be made) and, arguably, from divulging them in connection with the collection and payment over of the excise tax. These results obviously were not intended by Congress. As the Second Circuit reasoned in *United States* v. *Covello,* 410 F. 2d 536, 541–542, certiorari denied, 396 U.S. 879:

> Defendant argues that the divulgence of the toll slips was a prohibited disclosure by the corporate person of the existence of a commu-

nication within the meaning of § 605. We disagree. * * * Section 605 "must be interpreted in the light of reason and common understanding to reach the results intended by the legislature." *Rathbun* v. *United States,* 355 U.S. 107 * * *.

* * * [T]he keeping of toll records is a necessary part of the ordinary course of the telephone company's business and is necessary in order that the company may substantiate its charges to its customers. Toll records are kept for all telephone subscribers and are not kept just for subscribers being investigated by officers of the law, or ones suspected of criminal proclivities. The subscriber is fully aware that such records will be made * * *, and the records of the telephone company so kept in the ordinary course of the company's business are entitled to the same evidentiary treatment as the records of other businesses. See Federal Business Records Act, 28 U.S.C. § 1732 (1964). Section 605 was not designed to render evidentially inadmissible the records made in the ordinary course of the telephone company's business and which are essential to the ordinary operation of that business.[27]

[27] None of the court of appeals' decisions upon which petitioner relies is to the contrary. Indeed, those decisions go further and hold that wire interceptions effected by the telephone company may be divulged when necessary to protect the company against fraud. See *Bubis* v. *United States*, 384 F. 2d 643 (C.A. 9). Although this case does not involve fraudulent use of the telephone, neither does it involve wire interceptions. See, *e.g.*, *United States* v. *Gallo*, 123 F. 2d 229, 231 (C.A. 2); *Brandon* v. *United States*, 382 F. 2d 607, 610–611 (C.A. 10); *Di Piazza* v. *United States*, 415 F. 2d 99, 102 (C.A. 6); *Nolan* v. *United States*, 423 F. 2d 1031, 1044 (C.A. 10). The only issue here concerns the treatment of business records, not of wire interceptions, and that issue was, we submit, correctly decided by the court below and the Second Circuit in *Covello.*

B. RACING CHARTS OF THE CALIFORNIA HORSE RACING BOARD WERE PROPERLY ADMITTED UNDER THE BUSINESS RECORDS ACT

Racing charts kept by the California Horse Racing Board, an agency of the State of California, were offered by the government to establish the dates of, and other facts about, certain horse races on which co-conspirators Lawler and Swank had placed bets. Petitioner's objection that the charts were not admissible under the Business Records Act was overruled, and the charts were admitted into evidence.

The charts were admissible under the Act, which makes admissible "any writing or record * * * made as a memorandum or record of any act, transaction, occurrence, or event * * * if made in regular course of any business * * *." 28 U.S.C. 1732(a). The gravamen of petitioner's objection was that the charts had been compiled in the first instance by Triangle Publications, the private publishers of the "Daily Racing Form," rather than by the Board. But that fact does not render the charts inadmissible under the Act. The Board's chief investigator testified that the Board, as authorized by statute, had promulgated a rule or order authorizing Triangle Publications to compile the Board's official chart book and that the charts were kept by the Board in the normal course of its business (Tr. 237–238, 248–249, 251–252, 257–262; App. 36–39, 43–47). In other words, the charts were made on behalf of the Board by Triangle Publica-

tions as its agent. At least in the absence of any showing of unreliability, it is irrelevant under the Act whether the entrant of the records was an employee of the business or, as here, an employee of the business's agent.[28] And petitioner offered no evidence that the Board's charts were unreliable.

At the time of the admission of the charts into evidence, petitioner noted that his objection "also includes the objection to the business records exception to the hearsay rule, if that is the basis upon which these are admitted, which is a denial of confrontation of witnesses" (Tr. 264; App. 48–49). But this Court has specifically rejected the argument "that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced." *Dutton* v. *Evans,* 400 U.S. 74, 80 (plurality opinion of Mr. Justice Stewart); and see *id.* at 94 (concurring opinion of Mr. Justice Harlan). Accordingly, the district court correctly rejected petitioner's frontal attack on the constitutionality of the Business Records Act as applied in criminal cases. See, *e.g., United States* v. *Haili,* 443 F. 2d 1295 (C.A. 9); *Hanley* v. *United States,* 416 F. 2d 1160 (C.A. 5), certiorari denied, 397 U.S. 910. See

[28] Insofar as petitioner's argument rests upon the fact that the entries on the charts lay outside the personal knowledge of any member or employee of the Board, it is refuted by the plain language of the Act (28 U.S.C. 1732(a)):

> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

It is, moreover, undisputed that the entries on the charts lay within the personal knowledge of Triangle Publications' employees (Tr. 255–257; App. 41–43).

generally V Wigmore, *Evidence* § 1397 (Chadbourn rev. 1974)."[29]

CONCLUSION

The judgment of the court of appeals *en banc* should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
ANDREW L. FREY,
KEITH A. JONES,
Deputy Solicitors General.
JEROME M. FEIT,
FREDERICK W. READ III,
Attorneys.

JULY 1975.

[29] The foundational requirements for introducing the charts under the Act, in the context of this criminal prosecution, might have been more appropriately met by offering the testimony of the Triangle Publications' employee, or employees, who actually made the relevant entries. But petitioner's general objection to the Business Records Act was not sufficiently specific to call this point to the attention of the district court, at a time when any foundational deficiency could have been easily cured. In view of this fact, we believe that the court did not err in admitting the charts. Moreover, it remained open to petitioner to offer the testimony of Triangle Publications' employees in an attempt to show that the charts were unreliable and therefore inadmissible under the Act (Tr. 262–263; App. 47–48). There was, in fact, no serious dispute concerning the accuracy of the charts. Accordingly, petitioner was not substantially prejudiced by their admission upon the testimony of the Board's chief investigator.

U.S. GOVERNMENT PRINTING OFFICE: 1975